Petition

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No. 80-

In the Supreme Court of the United States

October Term, 1980

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
Petitioners,

vs.

JOE HOGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether decision of the Court of Appeals declaring Mississippi University for Women's single-sex status violative of the Equal Protection Clause (gender-based discrimination) was in error since it conflicts with decisions of this Court.

II.

Whether the Court of Appeals was incorrect in its interpretation and application of 20 U.S.C. § 1681 (a) (5), Title IX of the Educational Amendments of 1972 to this cause, when the clear language and legislative history of that federal statute support the continuance of Mississippi University for Women as a single sex institution.

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No. 80-

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MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
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vs.

JOE HOGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit; i.e. the panel decision dated June 5, 1981 and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc, dated August 13, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi, which is unreported, is set out in the appendix, *infra*, p. A1. The panel decision of the United States Court of Appeals for the Fifth Circuit is reported at 646 F.2d 1116, and is set out in the appendix, *infra*, p. A5. The judgment of the Court of Appeals, dated June 5, 1981 and issued as mandate August 14, 1981, appears in the appendix, *infra*,

at p. A18. The order of that Court granting appellant's motion for immediate issuance of mandate, filed August 14, 1981, is contained in the appendix, *infra*, p. A19. The order of declaratory judgment by the District Court, dated August 18, 1981, also appears in the appendix, *infra*, p. A20.

JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1981. Timely petitions for rehearing and rehearing en banc were denied August 13, 1981. The judgment of the Circuit Court was issued as an immediate mandate on August 14, 1981. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, 28 U.S.C. §§ 1331, 1343; Title IX, 20 U.S.C. § 1681 (a) (5), Educational Amendments of 1972; and Mississippi Code of 1972, § 37-117-3.

STATEMENT OF THE CASE

The petitioner is Mississippi University for Women (MUW), one of the eight (8) public universities in the State of Mississippi. Mississippi Code of 1972, § 37-101-1, § 37-117-1, et seq., as amended. The University was incorporated by an Act of the Legislature in 1884. It is recognized as the oldest state-supported institution of higher learning established exclusively for the education

of women in the United States. Since the foundation of MUW, it has steadfastly maintained a single-sex admissions policy, refusing to admit males into the academic programs for credit.

This cause of action concerns the allegations of a single plaintiff, Joe Hogan, white, male, who was denied admission to undergraduate nursing program because of his sex. The complaint filed in the district court sought preliminary and injunctive relief, declaratory judgment that the single-sex admissions policy was violative of the Equal Protection Clause of the Fourteenth Amendment,[1] compensatory damages of $25,000, costs and reasonable attorneys' fees. The allegations and requests for relief were founded upon 28 U.S.C. §§ 1331, 1343.[2]

It is the petitioners' contention that the maintenance of a single-sex institution such as Mississippi University for Women is constitutionally permissible. In its Memorandum Opinion on the motion for preliminary injunction, the district court below presented the judicial issue thusly:

> "At the time plaintiff applied for and was refused admission to the M.U.W. nursing program, at least two coeducational state supported institutions of higher learning (University of Southern Mississippi in Hattiesburg and University of Mississippi in Jack-

---

1. Initially, relief was also sought pursuant to Title IX, Educational Amendments of 1972, 20 U.S.C. § 1681, et seq., but apparently their claims have been abandoned. See District Court Opinion A. p. A1.

2. Although declaratory judgment is requested in the complaint, it is not jurisdictionally plead; the citation 28 U.S.C. §§ 2201, 2202 appears nowhere on the record. Such issues must be disclosed on the face of the complaint, *Oneida Indian Nation v. County of Oneida*, 1974, 414 U.S. 661, 665, 94 S.Ct. 772, 39 L.Ed.2d 73, 78, and it must be well plead. *Jewell v. City of Covington*, 5 Cir. 1970, 425 F.2d 459, 460.

son) offered programs leading to a bachelor's degree in nursing. Thus, this case presents a rather clear issue under the Fourteenth Amendment: within a statewide program of higher education which includes a number of coeducational institutions of higher learning, does the promulgation and enforcement of a policy which limits admission at one such institution to females thereby deprive a male applicant of his Fourteenth Amendment right to equal protection of the law.

In resolving this issue, we are guided by the decisions in *Williams v. McNair*, 316 F.Supp. 134 (D.C.S.C. 1970); affirmed 401 U.S. 951 (1971), and *Vorchheimer v. School District of Philadelphia*, 400 F.Supp. 326 (E.D. Pa. 1975); reversed 532 F.2d 880; affirmed 430 U.S. 703 (1977). Of course, we are bound by Supreme Court's summary affirmance in each of these cases unless the case at bar can successfully be distinguished on its facts. *Hicks v. Miranda*, 422 U.S. 332 (1975)." Appendix, *infra*, p. A2.

Further, that Court also recognized:

"In resolving this issue, we are guided by the decisions in *Williams v. McNair*, 316 F.Supp. 134 (D.C. S.C. 1970); affirmed 401 U.S. 951 (1971) and *Vorcheimer v. School District of Philadelphia*, 400 F.Supp. 326 (E.D. Pa. 1975); reversed 532 F.2d 880; affirmed 430 U.S. 703 (1977). Of course, we are bound by Supreme Court's summary affirmance in each of these cases unless the case at bar can successfully be distinguished on its facts. *Hicks v. Miranda*, 422 U.S. 332 (1975)." Appendix, *infra*, p. A2.

Predicated upon the foregoing authorities, and finding no likelihood of success upon the merits, *Canal Authority*

of State of Florida v. Callaway, 489 F.2d 567 (5 Cir. 1974), the preliminary injunction was denied by the district court December 23, 1980. In that same opinion, the court directed the plaintiff to submit genuine issues of fact within 20 days for a trial on the merits or summary judgment would be entered. The order granting summary judgment for the defendants was signed January 21, 1981.

The plaintiff filed his notice of appeal to the Court of Appeals from the denial of the preliminary injunction December 29, 1980. The notice of appeal from the order granting summary judgment was filed January 26, 1981. These appeals were consolidated.

On June 5, 1981, the Court of Appeals for the Fifth Circuit struck down the admissions policy of Mississippi University for Women which excluded the plaintiff, a male, stating, 646 F.2d 1116, 1119:

> "Doubtless, there are many in Mississippi who hold dear the continuation of the "W" as a place for educating the 'girls of the State.' Doubtless, too, there are some who would prefer to see Mississippi maintain an all-male college, as we are told it once did. It is not for this court to make a choice between creating an all-male institution comparable to MUW or desegregating it. We say only that the maintenance of MUW today as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution. Mississippi suggests no interest of male students which is served by this disparate treatment of females. Certainly it cannot argue on the facts of this case that the continued existence of MUW in its educational system is part of an overall program that benefits all students alike."

The panel decision of the Court of Appeals did not address the applicability of 20 U.S.C. § 1681 (a) (5) to this litigation because that legislation was an exercise of Congress' enforcement powers under § 5 of the Fourteenth Amendment, and created a permissible statutory exception for MUW to continue to exist under its present status. For that reason, a petition for rehearing and a suggestion for rehearing en banc was requested of the court. Both motions were denied August 13, 1981. The judgment of the court was issued as an immediate mandate August 14, 1981. A motion for recall and stay of the mandate was filed with the court, dated August 17, 1981. Even so, pursuant to the mandate, the district court issued its declaratory judgment August 18, 1981, stating that the admissions policy of the institution runs contra to the Equal Protection Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

When the Court of Appeals held that the admissions policy of Mississippi University for Women violated the Equal Protection Clause of the Constitution, it failed to consider the factual evidence upon the record that there were nursing education opportunities elsewhere in the public university structure of the State of Mississippi. As the district court observed in its Memorandum Opinion, there were at least two coeducational state-supported programs leading to a bachelor's degree in nursing. This argument has been presented to the Court in earlier cases, *Williams v. McNair*, 316 F.Supp. 134 (D.C.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), and *Vorchheimer v. School District of Philadelphia*, 400 F.Supp. 326 (E.D. Pa. 1975), *reversed*, 532 F.2d 880 (3 Cir. 1975), *aff'd*, 430 U.S. 703 (1977). Likewise, this case involves a defendant who was the direct bene-

ficiary of federal litigation which, on its face, permits the institution to exist as it has in the past. 20 U.S.C. § 1681 (a) (5). The legislative history substantiates the fact.

Certiorari should be granted in this case because:

1. There now exists a conflict of opinions concerning both fact and law between the Third, Fourth and Fifth Circuits.
2. An interpretation must be made by this Court of the proper status and applicability of 20 U.S.C. § 1681 (a) (5) to this Equal Protection question, *sub judice*. It is significant because it affects not only MUW, but other institutions of higher learning in the United States similarly situated.
3. The law in the area of gender discrimination is far from settled at this time.

ARGUMENT

I.

The Decision of the Court of Appeals Declaring Mississippi University for Women's Single-Sex Status Violative of the Equal Protection Clause (Gender-Based Discrimination) Was in Error Because It Conflicts With Decisions of This Court

In its opinion, the Court of Appeals declared that the two analogous cases which had reached this Court for review were inapplicable to this cause. This is not so.

The defendant university is unique among the other seven (7) public universities located at various locations throughout the State of Mississippi; MUW restricts its enrollment to women. For emphasis, the statute creating the

school stated in clear terms the purpose of its establishment:

> "The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time shall suggest as necessary or proper to fit them for the practical affairs of life." § 37-117-3, Mississippi Code of 1972, as Amended.

The language reciting the purpose for the existence of MUW is stated no differently in § 37-117-3 than in the statute approved in *Williams v. McNair,* supra, at p. 136, footnote 3.

Further an analysis of *Williams,* supra, and *Vorchheimer,* supra, clearly indicate that these cases, taken together, address the four corners of plaintiff's Equal Protection -classification- argument. On the one hand, *Williams,* supra, reflects the plaintiff Hogan's factual claims. The language of the decision clearly indicates an in-depth discussion of campus and/or program proximity to the residence of the applicant and/or prospective student including whether other educational opportunities existed in the State of Virginia. Conversely, *Vorchheimer* mirrors a complete investigation of the applicable judicial test concerning questions of discrimination based upon sex. Or, stated another way, Joe Hogan is in the same posture as the plaintiffs in *Williams.* Here, as there, Hogan had other well

established nursing programs which to attend. 316 F.Supp. 134, 137-138. Additionally, certain other factual conclusions of *Williams* also refute the Equal Protection argument put forth here in *Hogan*. At 316 F.Supp. 134, 138, is observed:

> "It is true that, in the case of some, if not all, of the plaintiffs, Winthrop is more convenient geographically for them than the other State institutions. They, in 'being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university'. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution."

Just as a reading of *Williams*, supra, presents a factual parallel to *Hogan*, the pages of *Vorchheimer*, supra, also permit a reflective analysis of the "substantial relationship" test espoused by the plaintiff *sub judice*. In *Vorchheimer*, that Court of Appeals went to great length to review the then case authority dealing with sex discrimination. There can be no doubt that the Court alluded to relevant case law concerning these constitutional questions. 532 F.2d 880, 885-886. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Stanton v. Stanton*, 421 U.S. 7, (1975).

The strictness of the applicability of the "substantially related" test of gender appear to vary depending upon the area in which gender may be affected. *Craig v. Boren*, 429 U.S. 190, 210-211 (1976). (Powell concurring) (Licensure); *Meloon v. Helgemoe*, 564 F.2d 602, 604-605, at footnote 3 (1 Cir. 1977). The focus here is upon collegiate

admissions. In *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court had this characterization for education:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *Rodriguez*, 411 U.S. 1, 35.

Defendants concur with the legal conclusion drawn in *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 888 (3 Cir. 1975). To paraphrase:

> "[This Court] need not decide whether this case requires application of the rational or substantial relationship tests, because, using either the result is the same.[10]

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[10]The district court said that there can be little doubt under the rational relationship test the board's regulation would be constitutional."

Given these facts and legal conclusions, a gender classification cannot equate with the denial of a fundamentally protected right such as voting, *Carrington v. Rush*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 337 U.S. 533 (1964); racial classifications, *Loving v. Virginia*, 388 U.S. 1 (1967); certain aspects of criminal procedure, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); and denial of welfare benefits in support of necessities, *Graham v. Richardson*, 403 U.S. 365 (1971).

II.

The Court of Appeals Was Incorrect in Its Interpretation and Application of 20 U.S.C. § 1681 (a) (5), Title IX of the Educational Amendments of 1972, to This Cause, When the Clear Language and Legislative History of That Federal Statute Support the Continuance of Mississippi University for Women As a Single-Sex Institution

20 U.S.C. § 1681 (a) (5) specifically states:

> "(5) In regard to admission this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;"

The above statutory language is the result of an amendment by Senator Lloyd Bentsen of Texas. 118 Cong. Rec. 5814. In offering the amendment, the Senator made the following remarks in support thereof. There can be little doubt what the purpose of his amendment was:

> "I am informed that there are only four of these institutions in the country, one in Texas, two in Virginia and one in Mississippi . . ."
>
> "Texas Woman's University has no wish to admit men and is forbidden by State law from doing so. If the Bayh amendment were agreed to and survived in conference, this institution would have to go to court to fight for its right to continue to exist as a women's insitution. I do not think it should have to do that. The women attending this institution do so voluntarily because they wish to have the experience of attending an all-female institution. If they did not want to attend, they could go to North Texas State or another institution of higher education in Texas." (Emphasis added) 118 Cong. Rec. 5814.

The amendment was accepted without objection. 118 Cong. Rec. 5815.

There are differences in the House version. According to Conference Report No. 798, the House of Representatives accepted the Senate version, including the Bentsen Amendment. [1972] U.S. Code Cong. & Admin. News, pp. 2608 at 2671.[3]

It is clear from the remarks by Senator Bentsen, supra, that MUW was the object of § 1681 (a) (5). Therefore, notwithstanding the factual distinction made by the panel, and the conclusion of the Court on rehearing, a reading of that statute's language indicates that it was the intent of Congress to permit gender-based discrimination in admission standards by certain women's colleges, including MUW. This statutory enactment is nothing more than an exercise of the authority granted to Congress under § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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3. Legislative history is a necessary tool in statutory interpretation and application. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978).

CERTIFICATE OF SERVICE

I, Ed Davis Noble, Jr., Assistant Attorney General for the State of Mississippi and one of the attonreys for the Petitioners do hereby certify that I have this day, served a true and correct copy of the foregoing Petition for Writ of Certiorari, to the following:

Wilbur O. Colom, Esquire
406 Third Avenue North
Columbus, Mississippi 39701

and

Wayne Drinkwater, Esquire
Post Office Box 918
Greenville, Mississippi 38701

This, the 27th day of August, 1981.

ED DAVIS NOBLE, JR.

Appendix

APPENDIX

(Filed December 23, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION
NO. EC 80-169-LS-P

JOE HOGAN,
Plaintiff,

v.

MISSISSIPPI UNIVERSITY FOR WOMEN, et al.,
Defendants.

MEMORANDUM OPINION

This action is brought to challenge the single-sex admissions policy of Mississippi University for Women (M.U.W.) on the grounds that plaintiff is thereby denied equal protection of the law in contravention of the Fourteenth Amendment. Plaintiff initially attempted to state a cause of action under 20 U.S.C. §1681, et seq., but he has since abandoned this ground for relief and now relies entirely on his Fourteenth Amendment claim.

There are no facts in dispute, although the parties differ sharply as to the law applicable to the undisputed facts.

Plaintiff is an adult male resident of Lowndes County, Mississippi, who was refused admission to the M.U.W. program leading to a bachelor's degree in nursing.

M.U.W. is a state supported institution of higher learning which has maintained a policy of admitting women

only since it was established in 1884. M.U.W. is part of a statewide program of higher education which includes six co-educational universities.

Although the parties could not stipulate regarding plaintiff's placement within the M.U.W. nursing program (a question of which credits, if any, held by plaintiff for his studies in other nursing programs would transfer for credit in the M.U.W. program) the parties did stipulate that plaintiff would qualify for admission but for the single-sex admissions policy of M.U.W.

At the time plaintiff applied for and was refused admission to the M.U.W. nursing program, at least two co-educational state supported institutions of higher learning (University of Southern Mississippi in Hattiesburg and University of Mississippi in Jackson) offered programs leading to a bachelor's degree in nursing. Thus, this case presents a rather clear issue under the Fourteenth Amendment: within a statewide program of higher education which includes a number of co-educational institutions of higher learning, does the promulgation and enforcement of a policy which limits admission at one such institution to females thereby deprive a male applicant of his Fourteenth Amendment right to equal protection of the law.

In resolving this issue, we are guided by the decisions in *Williams v. McNair,* 316 F.Supp. 134 (D.C.S.C. 1970); affirmed 401 U.S. 951 (1971), and *Vorchheimer v. School District of Philadelphia,* 400 F.Supp. 326 (E.D. Pa. 1975); reversed 532 F.2d 880; affirmed 430 U.S. 703 (1977). Of course, we are bound by Supreme Court's summary affirmance in each of these cases unless the case at bar can successfully be distinguished on its facts. *Hicks v. Miranda,* 422 U.S. 332 (1975).

Plaintiff attempts to distinguish *Williams* and *Vorchheimer* on the grounds that no exclusively male institution

of higher learning has been established by Mississippi to counterbalance the benefit afforded women by the creation and maintenance of M.U.W. Thus, plaintiff reasons, since Mississippi has not established a university exclusively for men, it cannot establish and maintain a university exclusively for women without running afoul of the Fourteenth Amendment. The court is of the opinion that this ingenious argument misperceives the standard the court must apply in measuring challenged state action against the requirements of the Fourteenth Amendment.

> The Equal Protection Clause of the Fourteenth Amendment does not require "identity of treatment" for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause. . . . Thus, the issue in this case is whether the discrimination in admission of students, . . . based on sex, is without rational justification. (Citations Omitted). *Williams v. McNair*, 316 F.Supp. 134, 136 (D.C.S.C. 1970).

The court finds that the maintenance of M.U.W. as an institution of higher learning for females only bears a rational relationship to Mississippi's legitimate interest in providing the greatest practical range of educational opportunities for its female student population. The court finds that the maintenance of M.U.W. as an institution of higher learning for females only is not arbitrary in that its single-sex admissions policy is consistent with a well established (although by no means universally accepted) body of opinion among educators regarding bene-

fits which may accrue to students who matriculate in a single-sex educational environment.

Since plaintiff failed to establish a likelihood of success on the merits, one of the prerequisites for preliminary injunctive relief under *Canal Authority of State of Florida v. Callaway,* 489 F.2d 567 (5 Cir. 1974), the requested preliminary injunction will be denied.

In its present posture, this case presents no genuine issue of material fact which would require resolution at trial. Unless within twenty days, plaintiff tenders a genuine issue of material fact for trial, summary judgment dismissing his claim will be entered.

Accordingly, it is

ORDERED:

That plaintiff's motion for preliminary injunction is hereby DENIED.

That plaintiff is hereby afforded a period of twenty days in which to tender a genuine issue of material fact for trial; otherwise, summary judgment will be entered dismissing his case on the merits.

SO ORDERED this 23rd day of December, 1980.

/s/ L. T. Senter, Jr.
United States District Judge

Joe HOGAN, Plaintiff-Appellant,

v.

MISSISSIPPI UNIVERSITY FOR WOMEN et al.,
Defendants-Appellees.

Nos. 80-4021, 81-4041.

United States Court of Appeals
Fifth Circuit.

Unit A

June 5, 1981.

Suit seeking declaratory and injunctive relief, as well as monetary damages, was brought against state-supported university, and others, by adult male who was interested in pursuing an education in nursing but who was denied admission to the university because of his sex. The United States District Court for the Northern District of Mississippi, at Aberdeen, L. T. Senter, Jr., J., denied injunctive relief and subsequently entered summary judgment for defendants, and plaintiff appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that maintenance of state-supported university that accepted only female applicants violated the Fourteenth Amendment right to equal protection of an otherwise qualified male applicant, even though he did not complain of the state's failure to have a corresponding school exclusively for his sex.

Appeal from denial of injunction dismissed as moot; summary judgment reversed in part, vacated in part, and remanded.

1. Colleges and Universities (Key) 1
Constitutional Law (Key) 224(2)

Maintenance of state-supported university that accepted only female applicants violated the Fourteenth

Amendment right to equal protection of an otherwise qualified male applicant, even though he did not complain of the state's failure to have a corresponding school exclusively for his sex. U.S.C.A.Const. Amend. 14; Miss.Code 1972, § 37-117-3.

2. Federal Courts (Key) 724

Appeal from denial of injunction sought by plaintiff, a male who was denied admission to state-supported university for nursing that accepts only female applicants, was moot by reason of the fact that the injunction had been sought for admission in the Spring, 1981, semester which had almost come to an end.

3. Federal Courts (Key) 728

Court of Appeals may act on a mootness problem sua sponte since a moot case presents no "case or controversy," a constitutional prerequisite to the exercise of power by the Court of Appeals.

4. Constitutional Law (Key) 224(1)

Gender-based classifications must be substantially related to important governmental objectives in order to withstand constitutional challenge. U.S.C.A.Const. Amend. 14.

5. Colleges and Universities (Key) 9

State has an interest, perhaps even a compelling one, in providing educational opportunities to women, but its interest does not stop with female citizens.

6. Civil Rights (Key) 3

Racial discrimination requires application of a higher level of scrutiny than does sex discrimination.

7. Constitutional Law (Key) 224(2)

Problem of a state providing a unique educational opportunity for females but not for males is that such an approach does not bear a substantial relationship to the state's important objective of providing for the education of all its citizens.

Wilbur O. Colom, Columbus, Miss., Robert Rubin, Jackson, Miss., ACLU of Miss., for plaintiff-appellant.

Ed Davis Noble, Asst. Atty. Gen., Jackson, Miss., for defendants-appellees.

Appeals from the United States District Court for the Northern District of Mississippi.

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS*, District Judge.

CHARLES CLARK, Circuit Judge:

[1] These consolidated appeals present the question whether the maintenance of a state-supported university that accepts only female applicants violates the fourteenth amendment right to equal protection of an otherwise qualified male applicant. On the facts of this case, we hold that it does.

The facts pertinent to this appeal are narrow and not in dispute. Mississippi University for Women (MUW), an institution supported by the State of Mississippi, has since its establishment in 1884, admitted females only. Joe Hogan, an adult male interested in pursuing an education in nursing, applied to the University for Women. Predictably, his application was rejected. The parties

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*District Judge of the Western District of Texas, sitting by designation.

stipulated that but for his sex, Hogan is qualified for admission. Mississippi supports two other universities that offer bachelor's degrees in nursing: University of Southern Mississippi in Hattiesburg and University of Mississippi in Jackson. Both are coeducational.

Hogan brought this suit seeking declaratory and injunctive relief, as well as monetary damages. The district court first denied Hogan's motion for a preliminary injunction requiring the defendants to admit him for the Spring, 1981, semester. Hogan's appeal from the denial of the injunction bears No. 80-4021. No. 80-4041 is Hogan's appeal from the district court's subsequent summary judgment dismissing the rest of his complaint.

[2, 3] Since the injunction Hogan sought was for admission for the Spring, 1981, semester, which has almost come to an end, the appeal in No. 80-4021 is moot.[1] We dismiss the appeal, vacate the judgment denying the preliminary injunction, and direct the district court to dismiss as moot the portion of the complaint seeking injunctive relief, without prejudice to any future injunctive relief Hogan may seek. *See New Left Education Project v. Board of Regents*, 472 F.2d 218, 220-221 (5th Cir.), *vacated*, 414 U.S. 807, 94 S.Ct. 118, 38 L.Ed.2d 43 (1973).

Hogan's case, insofar as it seeks declaratory and pecuniary relief, is not moot, for he is still seeking and still being denied admission. We now consider the merits of appeal No. 80-4041.

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1. We may act on this mootness problem *sua sponte* since a moot case presents no "case or controversy," a constitutional prerequisite to our exercise of power. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, 84 S.Ct. 391, 394 n.3, 11 L.Ed.2d 347, 350 n.3 (1964); *Locke v. Board of Public Instruction*, 499 F.2d 359, 363-364 (5th Cir. 1974).

At the hearing on Hogan's motion for preliminary injunction, he testified that he wanted to attend the University for Women, which is located in his hometown (Columbus), rather than one of the coeducational nursing schools, so that he would not have to give up a job he has held for six or seven years, move his family, and sell his house. Thus, Mississippi's maintenance of a corresponding all-male school, unless it were also located in Columbus, would not help Hogan. The precise question presented then, is this: Does a state violate the Equal Protection Clause by maintaining a one-sex school, where the plaintiff does not complain of the state's failure to have a corresponding school exclusively for his sex?

[4] The second sentence of the fourteenth amendment reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While at times in our history the impact of the Equal Protection Clause on gender-based discrimination was less than clear, that is not so today. In its more recent pronouncement on the subject, the Supreme Court has unanimously affirmed this court's judgment in *Kirchberg v. Feenstra*, 609 F.2d 727, 734 (5th Cir. 1979). There, we held that gender-based classifications must be substantially related to important governmental objectives in order to withstand constitutional challenge. In the Supreme Court's words, "express gender-based discrimination [has been] found unconstitutional absent a showing that the classification is tailored to further an important govern-

mental interest." *Kirchberg v. Feenstra*, ... U.S. ....., ..., 101 S.Ct. 1195, 1198, 67 L.Ed.2d 428, 433 (1981).[2] The policy of admitting only females to MUW is an express gender-based discrimination. While the right infringed in *Kirchberg* (property management) was arguably more fundamental than that infringed here (education),[3] the gender-based discrimination is by itself sufficient to require a substantial relationship to an important governmental objective. *Id.*; *Wengler v. Druggist Mutual Insurance Co.*, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

Kirchberg teaches that the district court was incorrect in relying on *Williams v. McNair*, 316 F.Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed.2d 235 (1971), and *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, *aff'd per curiam by an equally divided court*, 430 U.S. 703, 97 S.Ct. 252, 50 L.Ed.2d 176 (1977), to define a test of "rational relationship to a legitimate state interest" for this case. MUW's policy passed muster under that test in the district court. To this extent, the court erred.

The district court further concluded that Mississippi has a "legitimate interest in providing the greatest practical range of educational opportunities for its female student population." This conclusion presents another question, also inherent in the State's reliance on the statute creating M.U.W. as the justification for the single-sex institution:

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2. *But see Michael M. v. Superior Court of Sonoma County*, ... U.S. ....., ..., 101 S.Ct. 1200, 1204, 67 L.Ed.2d 437, 442 (1981): "Our cases have held, however, that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged" (Plurality opinion.)

3. *See San Antonio Ind. School Dist. v. Rodrigues*, 411 U.S. 1, 35, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16, 44 (1973).

> The purpose and aim of the Mississippi State College for Women [MUW's former name] is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life.

Miss.Code Ann. § 37-117-3 (1972). While this statute is based on role concepts for women that are no longer acceptable to many, our attention is focused on the provision aiming to advance the "girls of the state," and the corresponding finding of the district court. Hogan does not directly challenge this concept. However, a proper analysis of his argument requires that we do.

[5, 6] The state is attempting to justify gender-based discrimination with purposes that are likewise gender-based. Clearly, a state has an interest, perhaps even a compelling one, in providing educational opportunities to women. The problem is that its interest does not stop with female citizens. We recognize that racial discrimination requires the application of a higher level of scrutiny than does sex discrimination. Nevertheless, an analogy from this field is apt. If a state were to urge that it has a compelling interest in educating white persons, its urging would be, at best, half true. But such a half-true premise could not support the maintenance of racially segregated schools. This is so because the premise begs the question of the propriety

of discriminatory treatment. Similarly, to justify gender-based discrimination in this case, Mississippi cannot advance a reason that is based on gender.[4]

Hogan's action does not expressly complain of the failure of Mississippi to maintain an all-male college that offers nursing training. He simply challenges the maintenance of the all-female college, MUW. He wants to attend MUW; he does not seek to attend an all-male college. Nevertheless, the fact that the state does not maintain a corresponding all-male nursing school deprives it of law as well as logic to support its argument that it is not discriminating between, or that it is affording equal protection to, the sexes. *McNair* and *Vorchheimer* both involved systems with separate schools for each sex. Thus, the precise holdings of these cases are factually distinguishable. The State argues that Hogan's asserted inconvenience in attending state-supported, coeducational nursing schools vitiates his equal protection challenge under *McNair*. However, the State cannot contend it maintains a corresponding all-male school to provide a variety of educational settings to all its nursing students. Thus, the portion of *McNair* relied upon by the State (316 F.Supp. at 138) is inapposite.

[7] Mississippi has, as every states does, a significant and traditional purpose of providing for the education of

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4. The purpose advanced by the State of California in *Michael M. v. Superior Court of Sonoma County*, ___ U.S. ___, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), for the statute holding males criminally responsible for sexual intercourse with females under 18 years of age but not vice versa, was the prevention of teenage pregnancies. The Court accepted the purpose and upheld the statute, noting that the legal deterrence of the male roughly equalled the biological and psychological deterrence of the female. Our holding that a gender-based rationale for gender-based discrimination in education is unacceptable does not contravene this recent decision. There is nothing inherent in the biological make-up of males and females that legitimates a distinction between the two in the context of this case.

all of its citizens. This is "perhaps the most important function of state and local governments." *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880 (1954). The problem with providing a unique educational opportunity for females but not for males is that such an approach does not bear a substantial relationship to this important objective. We are aware that the Supreme Court has said the "question whether a statute is *substantially* related to its asserted goals is at best an opaque one." *Michael M. v. Superior Court of Sonoma Cty.,* ..... U.S. ....., ... n.10, 101 S.Ct. 1200, 1207 n.10, 67 L.Ed.2d 437, 445 n.10 (1981) (plurality opinion). It is the State's burden, however, to address that question. *See Kirchberg,* ..... U.S. at ....., 101 S.Ct. at 1199, 67 L.Ed.2d at 435; *Craig v. Boren,* 429 U.S. 190, 204, 97 S.Ct. 451, 460, 50 L.Ed.2d 397, 411 (1976). It has done so here only by conclusory statements which are insufficient to carry its summary judgment burden.

Doubtless, there are many in Mississippi who hold dear the continuation of the "W" as a place for educating the "girls of the State." Doubtless, too, there are some who would prefer to see Mississippi maintain an all-male college, as we are told it once did. It is not for this court to make a choice between creating an all-male institution comparable to MUW or desegregating it. We say only that the maintenance of MUW today as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution. Mississippi suggests no interest of male students which is served by this disparate treatment of females. Certainly it cannot argue on the facts of this case that the continued existence of MUW in its educational system is part of an overall program that benefits all students alike.

The policy of MUW that excludes Hogan because of his sex denies him the equal protection of the law as guaranteed by the fourteenth amendment. The appeal from the order denying preliminary injunction is dismissed, that judgment is vacated and remanded with instructions. The summary judgment dismissing Hogan's complaint insofar as it sought declaratory relief is reversed; the summary judgment dismissing Hogan's claims for monetary damages is vacated. The case is remanded to the district court for entry of a declaratory judgment in conformity with this opinion, and for such further proceedings on Hogan's other claims as that court may consider appropriate.

No. 80-4021—APPEAL DISMISSED, JUDGMENT VACATED, REMANDED WITH INSTRUCTIONS.

No. 81-4041—REVERSED IN PART, VACATED IN PART, AND REMANDED.

Joe HOGAN, Plaintiff-Appellant,

v.

MISSISSIPPI UNIVERSITY FOR WOMEN, et al.,
Defendants-Appellees.

Nos. 80-4021, 81-4041.

United States Court of Appeals,
Fifth Circuit.
Unit A

Aug. 13, 1981.

Suit seeking declaratory and injunctive relief, as well as monetary damages, was brought against state supported university, and others, by adult male who was interested in pursuing education in nursing but who was denied admission to university because of his sex. The United States District Court for the Northern District of Mississippi, at Aberdeen, L. T. Senter, Jr., J., denied injunctive relief and subsequently entered summary judgment for defendants, and plaintiff appealed. The Court of Appeals, 646 F.2d 1116, Charles Clark, Circuit Judge, dismissed appeal from denial of injunction as moot, reversed summary judgment in part and vacated in part, and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that existence of single-sex institutions was not authorized by exception to Emergency School Aid Act's prohibition of sex discrimination in educational institutions receiving federal financial assistance.

Denied.

Schools (Key) 19(1)

Existence of single-sex institutions was not authorized by exception to Emergency School Aid Act's prohibition of sex discrimination in educational institutions receiving federal financial assistance, since exception did not purport to and could not allow states to maintain practices otherwise violative of Fourteenth Amendment. Emergency School Aid Act, §§ 901 et seq., 901(a)(5), 20 U.S.C.A. §§ 1681, 1681(a)(5); U.S.C.A.Const. Amend. 14, § 5.

Appeals from the United States District Court for the Northern District of Mississippi.

ON PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(Opinion June 5, 1981, 5 Cir., 1981,
646 F.2d 1116).

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS*, District Judge.

PER CURIAM:

The State of Mississippi asserts that Congress has authorized the existence of single-sex institutions by enacting an exception to Title IX's prohibition of sex discrimination in educational institutions receiving federal financial assistance. That exception, 20 U.S.C. § 1681(a)(5), reads: "in regard to admissions, this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually

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*District Judge of the Western District of Texas, sitting by designation.

from its establishment has had a policy of admitting only students of one sex." This enactment, we are told, is an exercise of Congress's enforcement power under section five of the fourteenth amendment.

Congress may indeed enforce the fourteenth amendment by virtue of section five thereof, but this enactment does not purport to and could not allow states to maintain practices otherwise violative of that amendment.

The Petition for Rehearing is DENIED, and no member of this panel nor judge of this Administrative Unit in regular active service having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

(Filed August 18, 1981)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19
No. 80-4021
D.C. Docket No. EC 80-169-LS-P

JOE HOGAN,
Plaintiff-Appellant,

versus

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before CHARLES CLARK and GEE, Circuit Judges, and SPEARS*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal of the said District Court in this cause be, and the same is hereby, dismissed; the judgment of said District Court is vacated, and that this cause be, and the same is hereby remanded with instructions to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the defendants-appellees pay to the plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

JUNE 5, 1981

ISSUED AS MANDATE: Aug 14 1981

*District Judge

(Filed August 14, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NOS. 80-4021
& 81-4041

JOE HOGAN,
Plaintiff-Appellant,

versus

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Mississippi

ORDER:

IT IS ORDERED that appellant's motion for immediate issuance of mandate in the above causes is granted.

/s/ Charles Clark
United States Circuit Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION

NO. EC 80-169-LS-P

JOE HOGAN,
Plaintiff,

v.

MISSISSIPPI UNIVERSITY FOR WOMEN, et al.,
Defendants.

DECLARATORY JUDGMENT

In accordance with the mandate received this day from the United States Court of Appeals for the Fifth Circuit, it is hereby

DECLARED AND ADJUDGED:

That the policy of Mississippi University for Women which excludes plaintiff because of his sex denies plaintiff the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States of America.

SO DECLARED AND ADJUDGED this 18th day of August, 1981.

/s/ L. T. Senter, Jr.
United States District Judge

Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS
CLERK

No. 81-406

In the Supreme Court of the United States

October Term, 1981

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
Petitioners,

VS.

JOE HOGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed August 27, 1981
Certiorari Granted November 2, 1981

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Opinion of the United States Court of Appeals for the Fifth Circuit (Panel Decision) A5-A14
Opinion of the United States Court of Appeals for the Fifth Circuit (on Petition for Rehearing and Suggestions for Rehearing En Banc) A15-A17
Judgment of the United States Court of Appeals for the Fifth Circuit (issued as mandate) A18
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Order of the United States District Court for the Northern District of Mississippi (Order granting declaratory judgment) A20

RELEVANT DOCKET ENTRIES

6/19/80 Complaint filed, United States District Court, Northern District of Mississippi, Eastern Division

7/8/80 Answer of Defendants

12/22/80 Hearing on Plaintiff's Motion for Preliminary Injunction

12/23/80 Memorandum Opinion of District Court denying Motion for Preliminary Injunction; Order denying Plaintiff's Motion for Preliminary Injunction

12/29/80 Order, District Court denying Plaintiff's Motion for Injunction Pending Appeal; Notice of Appeal from Order of District Court, 12/23/80 denying Preliminary Injunction, Notice of Appeal by Plaintiff of denial of Preliminary Injunction (docketed in Court of Appeals as 80-4121)

1/9/81 Order of United States Court of Appeals for the Fifth Circuit, 1/5/81, denying Appellant's Motion for Injunction Pending Appeal, and granting Motion of Appellant to Expedite Appeal

1/21/81 Order of the District Court granting Summary Judgment for Defendants, dismissing cause with prejudice

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8/18/81 Orders of Court of Appeals issued as mandate, 8/14/81: (1) Order granting Appellant's Motion for Immediate Issuance of Mandate for 80-4021 and 4041, (2) Order dismissing Ap-

peal from District Court, vacating judgment of District Court and remanding with instructions for 80-4021, (3) Order reversing in part, vacating in part, and remanding to the District Court for 80-4041; costs to Appellees

8/18/81 Declaratory Judgment of the District Court in accordance with mandate of the Court of Appeals that the policy of MUW violative of equal protection of the law

8/21/81 Motion of Plaintiff for injunctive relief

8/21/81 Injunctive Order of District Court that Defendants take steps to enroll Plaintiff fall semester, 1981, with Order stating that the provisions are subject to Defendants' right of further appellate review and will be modified if necessary in light of further proceedings.

(Filed June 19, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
EASTERN DIVISION
CIVIL ACTION NO. EC 80-169-LS-P
JOE HOGAN,
PLAINTIFF,

VERSUS

MISSISSIPPI UNIVERSITY FOR WOMEN (MUW); THE MEMBERS OF THE MISSISSIPPI BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, VERNER S. HOLMES, BOBBY L. CHAIN, R. C. COOK, ROBERT W. HARRISON, CHARLES C. JACOBS, JR., JOHN R. LOVELACE, TRAVIS E. PARKER, NEAL D. ROGERS, JR., BETTY B. SHEMWELL, W. M. SHOEMAKER, MIRIAM SIMMONS, BOSWELL STEVENS AND BETTY A. WILLIAMS; JAMES W. STROBEL, PRESIDENT, MUW; J. B. ALINDER, DIRECTOR OF ADMISSIONS, MUW,
DEFENDANTS.

COMPLAINT

1. This is an action for declaratory, injunctive and monetary relief by a white male resident of Mississippi who was denied admission to Mississippi University for women (herein called MUW) because of his sex.

JURISDICTION

2. Plaintiff brings this action to protect his rights under the 14th Amendment to the United States Constitution and Title IX of the Educational Amendments of 1972

(20 U. S. C. §1681 et seq). The jurisdiction of this Court is involved pursuant to 28 U. S. C. §§1331, 1343.

PARTIES

3. Plaintiff, Joe Hogan, is an adult white male resident of Lowndes County, Mississippi, who applied for and was denied admission to the nursing program at MUW.

4. Defendant, MUW, is a state supported institution of higher education governed by the Board of Trustees of the State Institutions of Higher Learning. Both MUW and the Board of Trustees of the State Institutions of Higher Learning have in the past and are presently receiving funds from the United States Government.

5. Defendants Verner S. Holmes, Bobby L. Chain, R. C. Cook, Robert W. Harrison, Charles C. Jacobs, Jr., John R. Lovelace, Travis E. Parker, Neal D. Rogers, Jr., Betty B. Shemwell, W. M. Shoemaker, Miriam Simmons, Boswell Stevens and Betty A. Williams are members of the Board of Trustees of State Institutions of Higher Learning. These defendants are charged with the responsibility of adopting policies for MUW as part of the state system of higher education.

6. Defendant James W. Strobel is President of MUW and is charged with over supervision of admission policies.

7. Defendant J. B. Alinder is Director of Admissions for MUW and is charged with the administration of Admission policies.

CLAIM

8. On September 13, 1979, plaintiff applied for admission to the nursing program at MUW, and on September 19, 1979, he was advised by letter that his application was denied because MUW restricts enrollment to females.

9. Plaintiff is qualified for admission to the program, and has the following work experience and education:

a. Licensed Practical Nurse certificate (LPN) from Golden Triangle Vocational Technical Center (1974);

b. Associate of Applied Science Degree (RN), Itawamba Junior College (1979);

c. Employed as an orderly at Dugan Memorial Nursing Home (1972-1973);

d. Surgical technican, Golden Triangle Regional Medical Center (1974-1976);

e. Surgical supervisor, Golden Triangle Regional Medical Center (May, 1979-present).

10. By application to MUW's nursing program, plaintiff sought to meet the educational requirements for a Bachelors of Science (BS) degree in nursing.

11. The closest state institutions of higher learning, other than MUW, from which plaintiff could obtain a BS in nursing degree are located in Jackson, Mississippi and Hattiesburg, Mississippi. The distance from Columbus, Mississippi, the residence of plaintiff, and these institutions are 186 miles and 158 miles, respectively.

12. Plaintiff is married, a father, and employed. It would work an extreme personal and financial hardship for plaintiff to abandon his employment and move his family in order to study at a state institution that accepts men.

13. Plaintiff has already suffered injury as a result of MUW's female-only policy in that he was required to study for his Associate's Degree at a school out of the City of Columbus and was thereby required to travel daily to classes, at great cost and expense.

14. Further, plaintiff asserts that MUW now allows men to enroll in courses at the University, but will not permit the male student to receive academic credit for classes taken. The presence of men has not been shown to operate to the detriment of education at MUW.

15. Plaintiff asserts that the policy and practice of MUW of denying admission to men is violative of his right to equal protection under the 14th Amendment to the United States Constitution and contrary to Title IX of the Educational Amendments of 1972.

16. WHEREFORE, plaintiff requests the Court to:

a. take jurisdiction of this claim;

b. issue a preliminary injunction, to be permanent later, against MUW and the other defendants, enjoining it and them from enforcing the policy of refusing admission of males;

c. grant plaintiff a declaratory judgment that the policy of refusing admission to males to MUW is violative on its face, and as applied to the facts herein, of plaintiff's right to equal protection under the 14th Amendment of the United States Constitution and contrary to the express provisions of Title IX of the Educational Amendments of 1972;

d. award plaintiff compensatory damages of $25,000.00;

e. award plaintiff his reasonable attorney's fees and the costs of this action; and

f. award plaintiff such other relief as the Court deems just and proper.

Respectfully submitted,

Joe Hogan, Plaintiff
By: /s/ Wilbur O. Colom

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Opposition

Office - Supreme Court, U.S.
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OCT 6 1981
ALEXANDER L. STEVAS

No. 81-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MISSISSIPPI UNIVERSITY FOR WOMEN, *et al.*,
Petitioners,

v.

JOE HOGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-406

MISSISSIPPI UNIVERSITY FOR WOMEN, *et al.*,
Petitioners,

v.

JOE HOGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Joe Hogan lives with his wife in Columbus, Mississippi, where he is employed as a nurse at a local hospital. Interested in furthering his professional education, Hogan applied for admission to the nursing program at Mississippi University for Women (MUW), a state-supported university located in Columbus. Since its establishment in 1884, MUW has admitted only female students, apparently one of only two remaining state-supported universities in the United States to retain such a policy. MUW denied his application solely because of his gender. The parties have stipulated that but for his sex, Hogan is qualified for admission to MUW's nursing program, leading to a bachelor's degree in nursing.

MUW is the only one of Mississippi's eight public universities which limits its enrollment to females. All other universities are coeducational. There is no university which admits only males. At the time of Hogan's application, two other state-supported universities in Mississippi offered programs leading to a bachelor's degree in nursing: the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus. Petn. for Cert. A2. Hogan testified that he wished to attend MUW rather than one of the other coeducational nursing programs so that he would not be forced to sell his house, lose his job and move his family.

After hearing, the District Court denied Hogan's motion for a preliminary injunction for admission to MUW for the Spring, 1981 semester, and entered summary judgment for the defendants. The District Court found that MUW's gender-based discrimination was "not arbitrary" but bore a "rational relationship to Mississippi's legitimate interest in providing the greatest practical range of educational opportunities for its female student population." Petn. for Cert. A3. The Court of Appeals reversed, holding that the District Court's choice of the "rational relationship" test was improper, and that the defendants had failed to demonstrate that MUW's single-sex policy bore "a substantial relationship to an important governmental objective." Petn. for Cert. A10.

ARGUMENT

In a line of cases beginning with *Reed* v. *Reed*, 404 U.S. 71 (1971), and culminating in *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court has established "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. This intermediate level of equal protection review of gender-based discriminations was expressly and correctly applied by the Court of Appeals here. See Petn. for Cert. A10. Since *Craig* v. *Boren*, no Circuit has sought to apply a different standard of review. Accordingly, no conflict exists requiring this Court's attention.

Nor is it relevant that MUW's gender-based discrimination occurs in a context which does not implicate fundamental constitutional rights. The middle-level constitutional review applied below has been applied in cases involving the right to drink beer, *Craig* v. *Boren*; control over jointly-owned property, *Kirchberg* v. *Feenstra*, —— U.S. ——, 67 L.Ed.2d 428 (1981); worker's compensation benefits, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); alimony payments, *Orr* v. *Orr*, 440 U.S. 268 (1979); and public employment, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1980). None of these matters rises to the dignity of a fundamental constitutional right. The standard of review applied in these cases and by the Court of Appeals here is mandated by the gender-based nature of the discrimination, not the context in which it occurs.

As the Court of Appeals recognized, the burden of demonstrating that MUW's policy is substantially related to an important governmental objective rests with the defendants. *Kirchberg* v. *Feenstra*, —— U.S. ——, 67 L.Ed.2d at 433 n.7; *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. at 142. Neither at the hearing on the motion for preliminary injunction nor here do the defendants suggest any substantial justification for this

policy. The sole justification urged by defendants is found in the enabling legislation with which the Mississippi Legislature established MUW in 1884:

> "The purpose and aim of the Mississippi State College for Women [MUW's former name] is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary and proper to fit them for the practical affairs of life." Miss. Code Ann. § 37-117-3 (1972).

The language of this nineteenth century Mississippi statute demonstrates vividly MUW's genesis in the kind of "old notions" and "archaic and overbroad" stereotypes about women which this Court has repeatedly condemned. See *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975); *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). The Court of Appeals correctly refused to accept the statement contained in the statute as a basis for denying Joe Hogan admission to an educational program for which he is otherwise fully qualified.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

/s/ W. Wayne Drinkwater
W. WAYNE DRINKWATER, JR.
(Attorney of Record)

WILBUR O. COLOM

Amicus Brief

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MOTION FILED
OCT 20 1981

81-406

IN THE

Supreme Court of the United States

October Term, 1981

MISSISSIPPI UNIVERSITY FOR WOMEN, *et al.*,
Petitioners,

v.

JOE HOGAN,
Respondent

MOTION OF MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

BRIEF OF MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION AMICUS CURIAE

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Mississippi University for Women Alumnae Association is an organization consisting of the graduates and former students at Mississippi University for Women. The purpose of this organization is to preserve and promote the purposes of Mississippi University for Women as an institution devoted to the exclusive higher education of women. This organization did not participate in the litigation in this cause through the Court of Appeals and has not participated in the preparation or filing of the Petition for Certiorari filed on behalf of the defendants. It has a distinct interest in the outcome of this litigation representing, as it does, the thousands of women who have received the benefit of educational opportunities provided by Mississippi University for Women in the past 97 years.

The rights and equities of the members of this Association together with future prospective female students who will become members of the Association are a matter constituting a proper subject for consideration by the Supreme Court in reaching its decision as to whether or not to grant certiorari in this cause and if so, its final disposition of this case.

Consent has been requested for the filing of a brief and has been received from the petitioners. No consent has been received at this time from the respondent.

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Consent To The Filing Of A Brief

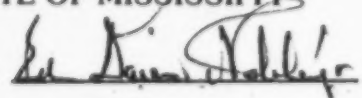
By

Mississippi University For Women Alumnae Association

As Amicus Curiae

Mississippi University for Women, et al, petitioners, in Cause No. 81-406 pending in the Suprene Court of the United States hereby consents to the filing by Mississippi University for Women Alumnae Association as amicus curiae of a brief pursuant to Rule 36 of Rules of the Supreme Court.

BILL ALLAIN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: 

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The interest of the Mississippi University for Women Alumnae Association is in having the Court to grant certiorari and having the Court overrule the holding of the Fifth Circuit Court of Appeals "Order" requiring the admission of a male fulltime undergraduate student to Mississippi University for Women. The interest of this party is more fully set forth in the Motion to which this Brief is appended.

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SUMMARY OF THE ARGUMENT

The maintenance of Mississippi University for Women as a single sex institution has been prohibited by the Fifth Circuit Court of Appeals' decision and this Court should grant certiorari to entertain a question of national importance and far reaching significance.

Gender-based discrimination is sometimes prohibited and sometimes permitted by this Court under the circumstances presented in different cases. Gender-based discrimination is prohibited where there is no legitimate state purpose served by such discrimination. On the other hand, discrimination is permitted where it is reasonably designed to further a state purpose or policy.

The need for affirmative action programs to overcome past discrimination and repression has been found by this Court to exist with respect to the past repression of women as well as with respect to the past oppression of blacks and other disadvantaged racial groups. A University devoted solely to the eduction of women is uniquely able to foster academic programs designed to overcome such past repression and statistics available in the case law indicates superior results reached in the uplifting of women through single sex colleges as compared with co-educational institutions.

The requirement imposed by the Fifth Circuit that Mississippi must operate an all male college in order to continue to operate MUW as all female is, we believe, specious in that Joe Hogan has no right to have a particular curriclum offered by a particular institution at a geographic location perferable to him from another location at which such program is now offered.* The equities of the women who will be best served by continuance of MUW's single sex status must be weighed against the respondent's rights and, in such a balance, are clearly preponderant.

ARGUMENT

.... The Mississippi University for Women Alumnae Association consisting of 18,700 members has a distinct interest in the preservation of its institution as a University devoted exclusively to the education of women. The so-called "women's movement" of the past decade has centered around the perception of many people of both sexes that our society has historically repressed women and relegated them to a competitive position inferior to men.

This perception has been associated with a broader effort of society to eradicate past evils growing from prejudices and discrimination on ethic, racial, sexual and other bases. In order to bring those historically disadvantaged elements of society into parity and afford true equal opportunity, state and federal governments have launched a number of programs frankly favoring the previously repressed groups. This Court has approved the rationale of such programs and has found in favor of Congressionally fixed and mandated goals such as the racial, minimum employment goals considered in *Fullilove et al, v. Klutznick, et al,* 100 S.Ct. 2758, 65 L.Ed. 2d 902 (1980) and employment preference practices in *Kaiser Aluminum and Chemical v. Webber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

American society in this late Twentieth Century is moving consciously away from a sexual double standard that has treated women as possessions, pets or servants of the dominant male to a new equalitarian atmosphere of unlimited opportunities of achievement. However, this state of equality, free of sexual bias, is difficult to obtain for at least two reasons: Women are "biologically" and psychologically different from men and thus require somewhat different approaches to such experiences as education. Most businesses and professions in America have so long been structured from the male perspective that women in our economy are much like left-handers who must learn to adapt to the implements and orientation of a right-handed world.

Secondly, in the aspect of life known as courtship or mate-pairing, the American female remains in the role of the

pursued sex, expected to adorn and groom herself to attract the male. Without comment on the common sense or equities of this social arrangement, it remains a sociological fact.

An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the educational atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis. Consequently, many such institutions flourish and their graduates make significant contributions to the arts, professions and business.

The news media abound with recent articles concerning the resurgence of women's colleges throughout the United States and the Women's College Coalition is an active political group which won the unqualified endorsement of the immediate prior administration.

Numerous well-documented sociological studies of the present decade indicate that women's colleges are able to provide their students with more meaningful role models from proportionately greater numbers of female faculty members and provide their students with the opportunity to deal effectively with women who are in a position of supervision and control.

A history of higher education in Mississippi reveals the Mississippi University for Women came into being for this laudable purpose which is more recognized and timely today than at any time in its past century of service.

The broad spectrum of positive actions to overcome the discriminations and abuses intended to be abolished by the Fourteenth Amendment certainly should include programs to uplift women from their Nineteenth Century status as the suppressed sex. Legions of witnesses could testify to the advantages afforded to achieve that goal by a woman's

college or university as opposed to one whose doors are open to both sexes.

We sincerely believe that the narrow Fourteenth Amendment interpretation of the Fifth Circuit Panel opinion is a regressive and a repressive holding which fails to take into consideration the laudable and progressive purposes of Mississippi's maintenance of its University for Women. The opinion, of course, emasculates the very reason for the existence of the Institution for if it is not Mississippi University for Women, it is by obvious definition a university without raison d'etre.

The Mississippi University for Women Alumnae Association finds it particularly distressing and difficult to concede that the result in this case is mandated as asserted in the Fifth Circuit Panel Opinion by the Supreme Court's holding in *Kirchberg v. Feenstra*, ____U.S.____, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981). To declare that a holding striking down a Louisiana statute which permitted a husband to mortgage his wife's homestead to a lawyer engaged to defend him against a charge brought by the wife of molesting their minor daughter is a far cry indeed from the purposes of the Mississippi Statute authorizing the operation of this women's university as a means of overcoming such past concepts of the male as "head and master" as referred to Mr. Justice Marshall in the *Kirchberg* opinion. We read *Kirchberg* to hold that the condemned Louisiana Statute giving a husband exclusive control over the disposition of community property was a law discriminatory on its face and having no relationship to the achievement of an important governmental objective:

> Because this provision explicitly discriminated on the basis of gender, the Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective...the Court...found that the state had failed to show why the mandatory designation of the husband as manager of the

property was necessary...

> By granting the husband exclusive control over the disposition of community property, ART 2404 clearly embodies the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important govermental interest. In defending the constitutionality of ART 2404, appellant Kirchberg does not claim that the provision serves any such interest. 101 S.Ct. at 1198.

On the contrary, the MUW Alumnae claim strongly that the existence of their institution serves an important governmental interest. It is one of the activities which Courts have concluded may be gender based.

Although the Fifth Circuit Panel Opinion in this case states that *Kirchberg* teaches that the District Court was incorrect in relying on *Williams v. McNair,* 316 F.Supp. 134 (D.S.C. 1970), aff'd mem. 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed.2d 235 (1971), and *Vorchheimer v. School District of Philadelphia,* 532 F.2d 880, aff'd 430 U.S. 703, 97 S.Ct. 252, 50 L.Ed.2d 176 (1977), we do not find any reference to either opinion in the Supreme Court's opinion in *Kirchberg v. Feenstra,* supra. To the contrary, *Kirchberg* deals with a patently unjustified gender discrimination threatening the basic rights of all women for the protection of their own homestead while *Williams* and *Vorchheimer* approve state action in maintenance of single sex educational institutions as gender-based discrimination which does pass constitutional muster because of the achievement thereby of a legitimate governmental objective.

To this end, let us examine language in the *Williams* opinion which gained the approval of this Court:

> It is true that, in the case of some, if not all of the plaintiffs, Winthrop is more convenient geographically for them than the other state institutions. They, in being denied the right to attend

> the state college in their hometown, are treated no differently than are other students who reside in communities many miles distant from any state supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution. 316 F.Supp. 138.
>
> It is only when the discriminatory treatment in varying standards, as created by the legislative or administrative classification, are arbitrary and wanting in any rational justification that they offend the equal protection clause. 316 F.Supp. 136.
>
> Flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned. 316 F.Supp. 138.

The District Court in *Williams* listed a catalog of gender-based discrimination which the Supreme Court has approved as constitutionally permissible.

In *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 394, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330 (1937), this Court approved a statute providing minimum wages for women, but not men, on this very basis of a history of economic disadvantages to women workers justifying a positive remedial program. Numerous other examples of gender distinctions approved as having legitimate governmental purposes are set forth in the *Williams* opinion, 316 F.Supp. 136-137. Aside from the cases cited in *Williams*, we would respectfully suggest to the Court other cases reaching similar results.

Statutes visiting economic benefits upon some and hardships on others have been upheld where a legitimate gov-

ernmental purpose underlies the statute. In *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976), the Supreme Court reinstated the holding of the District Court approving a New Orleans city ordinance severely restricting the rights of some, but not all push-cart food sellers. The Fifth Circuit had reversed the District Court and held invalid the ordinance which prohibited push-cart sellers from marketing food stuffs in the French Quarter except for those protected by grandfathering provision which exempted those that had operated such businesses for 20 or more years. Clearly, no equitable justification exists for displacing from business those having engaged in the trade for 9, 12 or 19 years, but permitting those with 20 or more years to continue. No effort was made to justify the economic disadvantages visited upon those prohibited by the ordinance, but the ordinance was approved by the Supreme Court on the basis that there is a legitimate governmental purpose "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists" and that reduction of the vendors' numbers by the statute's distinction would serve that purpose. This ordinance was reinstated by the Supreme Court without dissent.

We submit it has some analogy here although the purpose of Mississippi in maintaining its University for Women is much more compelling. In the instant case, the appellate panel found that plaintiff Hogan would suffer the economic hardship of having to travel somewhat more than 100 miles from his present residence to pursue a nursing curriculum offered by the state to male students. In *New Orleans v. Dukes*, the excluded vendors would obviously suffer the economic hardship of moving to another area to pursue the business in which they had invested or be put out of that trade and forced to seek another. The Court has said this is permissible because the state has a legitimate interest in denying them that economic opportunity.

The argument for permitted continuance of MUW for women only finds more compelling support in an examination of cases in which the Supreme Court has addressed gender-based discrimination.

In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), this Court struck down an Idaho statute arbitrarily favoring males over females of the same degree of kinship for the right to administer estates of decedents. There was clearly no state purpose to be served by that arbitrary preference.

The next year in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), the Court struck down an armed force regulation which provided additional quarter's allowances to a male officer who had a spouse while denying the same additional allowance to a married female officer without express proof of her spouse's dependency.

In the opinion of the Court, Mr. Justice Brennan discussed the rationale set forth earlier in *Reed*, supra, and applied then in *Frontiero* including this language which buttresses our earlier argument:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage....
>
> As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and indeed, throughout much of the Nineteenth Century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied

> the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal, An American Dilemma 1073 (20th Aniversary ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right - which is itself "preservative of other basic civil and political rights" - until adoption of the Nineteenth Amendment half a century later.
>
> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sexual characteristic, women still face pervasive, although at times more subtle, *discrimination in our educational institutions*, in the job market and, perhaps most conspicuously, in the political arena. See generally K. Amundsen, The Silenced Majority: Women and America Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, a Matter of Simple Justice (1970). (Emphasis Added.)
>
> ***
>
> As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 93 S.Ct. 1769-1770.

The next year another gender discrimination case was before the Supreme Court in *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). Here the reasoning and the facts were somewhat different. Florida's statute granting automatic $500 property tax exemption to widows was attacked by a widower as sexually discriminatory and thus, unconstitutional. The Supreme Court's majority upheld the Florida statute as an affirmative effort to overcome invidious past discrimination against women. Mr. Justice

Douglas delivered the opinion of the Court containing the following language:

> Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. (Footnote: In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000. U.S. Bureau of the Census: Current Population Reports, Series P-60, No. 80.) There are, of course, efforts under way to remedy this situation ....But firmly entrenched practices are resistant to such pressures, and, indeed, data compiled by the Women's Bureau of the United States Department of Labor shows that in 1972 a woman working full time had a median income which was only 57.9% of the median for males - a figure actually six points lower than had been achieved in 1955. Other data point in the same direction...
>
> There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation." (Citing Reed v. Reed).
>
> This is not a case like Frontiero v. Richardson, supra, where the Government denied its female employees both substantive and procedural benefits granted males "solely for administrative convenience." We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that "where taxation is concerned and no specific federal right, apart from equal protec-

> tion, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."
>
> A state tax law is not arbitrary although it "discrimnates in favor of a certain class....if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution. 94 S.Ct. 1735-1737.

In this case even the dissenting opinions concur with the arguments of positive programs to combat past discriminations which we advance here:

> Mr. Justice Brennan:
>
> I agree that, in providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups. No one familiar with this country's history of pervasive sex discrimination against women can doubt the need for remedial measures to correct the resulting economic imbalances. Indeed, the extent of the economic disparity between men and women is dramatized by the data cited by the court, ante, at 1936-1737. By providing a property tax exemption for widows, Section 196.01(7) assists in reducing that economic disparity for a class of women particularly disadvantaged by the legacy economic discrimination. In that circumstance, the purpose and effect of the suspect classification are ameliorative; the statute neither stigmatizes nor denigrates widowers not also benefited by the legislation. Moreover, inclusion of needy widowers within the class of beneficiaries would not further the State's overriding interest in remedying the economic effects of past sex discrimina-

> tion for needy victims of that discrimination. While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows. 94 S.Ct. 1739, 1740.

In the next year, the Supreme Court decided *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 612 (1975) and upheld a sex differential applied in the U.S. Navy for permissible time in grade for officers before requiring that those who are not selected for promotion be discharged. The unequal privileges accorded to women officers were challenged by a male naval officer adversely affected by the discriminatory mandatory discharge rule, but the majority of the Court dismissed his complaint and approved the favored treatment given women officers under the regulation saying:

> The different treatment of men and women naval officers under Sections 6382 and 6401 reflects not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service... Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs." 419 U.S. 508, 509, 95 S.Ct. 577, 578.

Another case we believe worthy of consideration in futherance of our argument is *Parham v. Hughes,* 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979). This involved an appeal from a judgment of the Supreme Court of Georgia holding constitutional a statute precluding the father of an illegitimate child from suing for his wrongful death. In that case,

although the appellant was the admitted biological father of the decedent, the child's mother had been killed in the same accident and the appellant had signed the child's birth certificate as his father and contributed to his support, permitted the child to use his name and visited the child regularly, the Court nevertheless upheld the statute and denied the father the right to bring the claim:

> In the absence of invidious discrimination, however, a Court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Vance v. Bradley, 440 U.S.___, 99 S.Ct. 943 (footnote omitted). The threshold question, therefore, is whether the Georgia statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the legislature's actions were irrational." Id., at___, 99 S.Ct. at 943. 99 S.Ct. 1746.
>
> The Court has also held that certain classifications based upon sex are invalid under the Equal Protection Clause, (citing Reed, Frontiero and others). Underlying these decisions is the principle that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class....

> In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity. 99 S.Ct. 1747.

It is forcefully pointed out in the dissenting opinion that the interest of the State of Georgia in maintaining this patently gender discriminatory bar is at best tenuous. Very little clear cut benefit to the State appears. Nevertheless, the scheme has been approved as not violative of the Fourteenth Amendment.

We respectfully submit that the interest of the State of Mississippi in maintaining a female University in which previously repressed women of Mississippi and other states can make strides toward sexual equality in academe and in the market place is a public interest deserving of approval.

The Court of Appeals' conclusion was that Mississippi University for Women could be maintained as a single sex institution if, but only if, the state established at some other location an all male college or university. To grant relief to the plaintiff, Hogan, on this basis is, we believe, a non sequitur. Arguendo, if Mississippi should be required to establish an all male institution in order to maintain its all female institution, it would certainly be free to do so at some locale other than Columbus and Joe Hogan presumably then would have neither complaint nor remedy. Should Mississippi go back to the maintenance of Delta State University as all male, as was once the case, and have the female students of the Cleveland area barred from their present admission to that institution? Such requirement, we believe, would be a futile exercise and would undermine the positive program for improvement of the status of women.

There is a wealth of educational studies extolling the superior accomplishments of graduates of women's colleges but both the restrictions of space and impropriety of introducing matters outside the record proscribe our reference to many of these. However, in the jurisprudential literature,

one finds in the Third Circuit's opinion in *Vorchheimer*, supra, affirmed by this Court, references to an example of such studies:

> The defendants also relied on the testimony of Dr. M. Elizabeth Tidball who studied the educational background of those recognized in Who's Who of American Women. She found that the percentage of those listed was higher for graduates of women's colleges than for those of co-ed schools. 532 F.2d 882.

SUMMARY

We believe a strong case is made for this Court granting certiorari and receiving further briefs and arguments on the question of whether or not this century old institution devoted to the increasing of opportunities for women should be summarily swept away under the aegis of Fourteenth Amendment Equal Protection for the convenience of one male applicant.

Respectfully submitted,

MISSISSIPPI UNIVERSITY FOR WOMEN
ALUMNAE ASSOCIATION AMICUS CURIAE

BY:

CERTIFICATE

I, the undersigned, attorney for Mississippi University for Women Alumnae Association Amicus Curiae, do hereby certify that I have this date mailed a true and correct copy of the foregoing BRIEF OF MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION AMICUS CURIAE to the following:

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Petitioner's Brief

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No. 81-406

In the Supreme Court of the United States

October Term, 1981

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
Petitioners,

vs.

JOE HOGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

I.

Whether the decision of the Court of Appeals declaring Mississippi University for Women's single-sex admission standards violative of the Equal Protection Clause (gender based discrimination) was in error because it conflicts with decisions of this Court and other supportive authority.

II.

Whether the Court of Appeals was incorrect in its interpretation and application of 20 U.S.C. § 1681 (a) (5), Title IX, Education Amendments of 1972, to this action, when the clear language and legislative history of the federal statute support the continued existence of Mississippi University for Women as a single-sex institution.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi (Pet. App. A 1-4) is unreported. The panel decision of the United States Court of Appeals for the Fifth Circuit (Pet. App. A 5-14) is reported at 646 F.2d 1116, and the decision of the appellate court on petition for rehearing and suggestion for rehearing *en banc* (Pet. App. A 15-17) is reported at 653 F.2d 222.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A 18) was entered June 5, 1981. A petition for rehearing and suggestion for rehearing *en banc* was denied August 13, 1981. (Pet. App. A 15-17). The judgment of the circuit court, supra, was issued as an immediate mandate on August 14, 1981. The petition for a writ of certiorari was filed August 27, 1981, and was granted on November 2, 1981. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Fourteenth Amendment:

> Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

20 U.S.C. § 1681 (a) (5), Title IX, Education Amendments of 1972:

§ 1681. Prohibition against sex discrimination - Exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . .

* * *

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

Section 37-117-3, Mississippi Code of 1972:

The purpose and aim of the Mississippi State College for Women is the moral and inteliectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time shall suggest as necessary or proper to fit them for the practical affairs of life.

STATEMENT OF THE CASE

The appeal now before this Court was filed and maintained as an individual action. (App. A 4-5). As the plaintiff below, on September 13, 1979, Joe Hogan, a male, applied for admission as an undergraduate student in the School of Nursing at Mississippi University for Women (MUW, the University). (R. Tr. 4-5; Ex. 2, by Stipulation). By letter addressed to Hogan and dated September 19, 1979, the University formally instructed the applicant that his request was denied. The reason given was that the institution accepts only females as regularly enrolled students.[1] (R. Tr. 5-6; Ex. 3, by Stipulation). Subsequently, on June 19, 1980, Hogan filed his Complaint in the district court seeking a preliminary injunction, declaratory judgment that the single-sex admissions policy of MUW was violative of the Equal Protection Clause of the Fourteenth Amendment,[2] compensatory damages of $25,000, costs and reasonable attorney's fees. The allegations and requests for relief were founded upon 28 U.S.C. §§ 1331, 1343.[3]

The Equal Protection argument of Hogan is founded upon two (2) bases: (1) Mississippi University for

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1. Mississippi University for Women was founded in 1884. It is recognized as the oldest state-supported institution of higher learning established exclusively for the education of women in the United States. §§ 37-117-1, 37-117-3, Mississippi Code of 1972. (R. Tr. 4; Ex. 1, by Stipulation, pp. 6-12).

2. Initially, relief was also sought pursuant to Title IX, Educational Amendments of 1972, 20 U.S.C. § 1681, et seq., but apparently their claims have been abandoned. (App. A 3, 6; but see: Pet. App. A 1).

3. Although declaratory judgment is requested in the Complaint, it is not jurisdictionally pled; the citation 28 U.S.C. §§ 2201, 2202 appears nowhere on the record. Such issues must be disclosed on the face of the Complaint, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 665, 94 S.Ct. 772, 39 L.Ed.2d 73, 78 (1974), and it must be well pled. *Jewell v. City of Covington*, 425 F.2d 459, 460 (5 Cir. 1970).

Women's policy of restricting its enrollment to females is an unconstitutional classification based on gender; (2) The refusal to admit him because he is male places an undue economic burden on him to seek educational opportunity at other public institutions located at a greater distance from his present residence than MUW.[4] (App. A 5-6).

It is the position of Mississippi University for Women, et al., that the maintenance of the institution as a single-sex university is constitutionally permissible because of the specific statutory exception granted it by Congress pursuant to § 5 of the Fourteenth Amendment to the Consitution. 20 U.S.C. § 1681 (a) (5); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-456, 96 S.Ct. 2666, 49 L.Ed.2d 614, 620-622 (1976). The respondents further state that the operation of M.U.W. as a unique educational institution assuredly serves a very important governmental interest, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29, 93 S.Ct. 1278, 36 L.Ed.2d 16, 41 (1973),[5] while providing an avenue of affirmative action for females. See *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed. 2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); and *Cannon v. University of Chicago*, 441 U.S. 677, 747, 99 S.Ct. 1946, 60 L.Ed.2d 560, 606-607 (1979) (Powell, dissenting).

A hearing on Hogan's motion for a preliminary injunction was held in the district court December 22, 1980. On December 23, 1980, that court issued its Memorandum Opinion denying the prayer that the complainant be admitted to the university the Spring Semester, 1981. (Pet.

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4. Hogan resides in Columbus, Mississippi, the site of MUW.

5. Quoting *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873, 880 (1954), that "Today, education is perhaps the most important function of state and local governments."

App. A 1-4). Subsequently, Hogan perfected a consolidated appeal to the Fifth Circuit. The denial of the injunction bore the circuit number 80-4121. Number 80-4041 is the appeal of the summary judgment dismissing the rest of the Complaint. (Pet. App. A 8, 646 F.2d 1116, 1117).

On June 5, 1981, the Circuit Court rendered its panel decision. The Court dismissed the request for Spring 1981 admission as moot (Pet. App. A 8, 646 F.2d 1116, 1117), and, considering the merits of No. 80-4041, struck down the admissions policy of M.U.W., stating:

> Doubtless, there are many in Mississippi who hold dear the continuation of the 'W' as a place for educating the 'girls of the State.' Doubtless, too, there are some who would prefer to see Mississippi maintain an all-male college, as we are told it once did. It is not for this court to make a choice between creating an all-male institution comparable to MUW or desegregating it. We say only that the maintenance of MUW today as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution. Mississippi suggests no interest of male students which is served by this disparate treatment of females. Certainly it cannot argue on the facts of this case that the continued existence of MUW in its educational system is part of an overall program that benefits all students alike.
>
> The policy of MUW that excludes Hogan because of his sex denies him the equal protection of the law as guaranteed by the fourteenth amendment. (Pet. App. A 13-14, 646 F.2d 1116, 1119).

The panel decision of the court of appeals did not address the applicability of 20 U.S.C. § 1681 (a) (5) to this litigation. For that reason, a petition for rehearing and a

suggestion for rehearing *en banc* were requested of the court. Both motions were denied August 13, 1981. (Pet. App. A 15-17, 653 F.2d 222). The judgment of the court was issued as an immediately mandate August 14, 1981. A motion for recall and stay of the mandate was filed with the court, dated August 17, 1981. (Pet. App. A 19). Even so, pursuant to the mandate, the district court issued its declaratory judgment August 18, 1981, stating that the admissions policy of the institution runs contra to the Equal Protection Clause of the Fourteenth Amendment. (Pet. App. A 20).

The Petition for Writ of Certiorari was filed August 27, 1981. Certiorari was granted November 2, 1981.

SUMMARY OF ARGUMENT

Mississippi University for Women is one of eight (8) public universities in the State of Mississippi, established in 1884. It is the oldest state-supported women's school in the United States. Since its foundation, the institution has steadfastly maintained a single-sex admissions policy, refusing to admit males into its academic programs for credit.

It is the position of the State of Mississippi that the gender-based collegiate admission standard of the university is constitutionally permissible. The existence of MUW as a single-sex institution of higher learning serves a unique purpose: it provides an alternative learning atmosphere for females which is nothing more than educational affirmative action for females. Such a statutory classification denies no rights, *Schlesinger v. Ballard*, 419 U.S. 498, 508-509, 95 S.Ct. 572, 42 L.Ed.2d 610, 618-619 (1975); *Kahn v. Shevin*, 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed.2d 189, 193 (1974), rather, it addresses a national

commitment to eliminate, in this case compensate for, past discrimination due to sex. See *Cannon v. University of Chicago*, 441 U.S. 677, 747, 99 S.Ct. 1946, 60 L.Ed.2d 560, 606-607 (1979). For these reasons, it is clear that the operation of MUW serves an important governmental objective, within the statutory definition of its purpose. § 37-117-3, Mississippi Code of 1972; *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

Likewise, MUW, having refused to admit males from its inception is the direct beneficiary of federal litigation which, on its face, permits the institution to exist as it has in the past 20 U.S.C. § 1681 (a) (5). Legislative history further substantiates that fact. 118 Cong. Rec. 5814-5815. This is a congressional prerogative under § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-456, 96 S.Ct. 2666, 49 L.Ed.2d 614, 620-622 (1976).

ARGUMENT

I.

The Decision of the Court of Appeals Declaring Mississippi University for Women's Single-Sex Admission Standards Violative of the Equal Protection Clause (Gender Based Discrimination) Was in Error Because It Conflicts With Decisions of This Court and Other Supportive Authority

The panel opinion of the Court of Appeals presumes that admitting only females to the nursing program at Mississippi University for Women is a clear case of sex discrimination which "cannot be squared with the Constitution." 646 F.2d 1116, 1119. The answer in the area of gender based classifications is not that simple. The problem must be approached by analyzing questions involving the identification of certain constitutional classifications, and

what particular right is involved, as well as which gender is affected by the classification then under scrutiny, and each such challenge on a case-by-case basis.

Although sex (or gender), unlike race, alienage or national origin has not been held by this Court to constitute an inherently "suspect" classification; the Court has addressed sex as a classification. The genesis of the standard of review for gender-based classification appears in *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225, 229 (1971):

> A classification 'must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the litigation, so that all persons similarly circumstanced shall be treated alike.'

Since *Reed*, supra, there have been other opinions concerning challenges to gender classifications which have effected a variety of interests. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (armed services benefits); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) (Florida property tax exemption); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (armed services regulation regarding length of service before mandatory discharge); *Weinberger v. Wisenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (social security survivor's benefits); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (greater age of majority for males in contest of parental support for children); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (different ages for consumption of "nonintoxicating" beer); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (discrepancy between old-age widows' and widowers' survivor's benefits); *Wengler v. Druggists Mutual In-*

surance Company, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) (workers' compensation statute concerning death benefits); *Kirchberg v. Feenstra,* ..... U.S. ....., 101 S.Ct. ....., 67 L.Ed.2d 428 (1981) (control over disposition of jointly owned community property); *Michael M. v. Superior Court of Sonoma County,* ..... U.S. ....., 101 S.Ct. ....., 67 L.Ed.2d 437 (1981) (age differential on criminal offenses); *Rostker v. Goldberg,* ..... U.S. ....., ... S.Ct. ....., 69 L.Ed.2d 478 (1981) (draft exemption).

Admittedly, § 37-117-3, Mississippi Code of 1972, establishes a collegiate admissions criteria based on sex, female. The present test for judicial review of such a statute appears in *Craig v. Boren,* supra, 429 U.S. 190, 197:

> Analysis may appropriately begin with the reminder that Reed emphasized that statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.' 404 U.S., at 75, 30 L.Ed.2d 225, 92 S.Ct. 251. To withstand constitutional challenge, previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

This is not a case where classifications are made on the basis of sex or solely for administrative convenience. Compare *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) and *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

As previously stated, while the right infringed upon here (education) is not a fundamental one, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16, 44 (1973), it has been recognized by this Court as "perhaps the most important function of state and local governments." *Brown v. Board of Edu-*

cation, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed.2d 873, 880 (1954). It is apparent that Congress itself recognized this principle when it enacted the Education Amendments of 1972; synonymously, that very legislation acknowledged the important role of single-sex institutions of higher learning in the field of education *and* their stature in promoting affirmative action, particularly for women. In *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), appears the following observations, confirming the need for affirmative action for women:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. 411 U.S. 677, 684.
>
> * * *
>
> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and perhaps most conspicuously, in the political arena. 411 U.S. 677, 685-686.

In *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed 551 (1908), this Court placed heavy reliance upon published materials containing facts which were pertinent to the reasonableness of the legislation. Since the opinions of the Courts below are based on nothing more than judicially opted stipulations, this case is not dissimilar from *Muller* in that justification for these statutes, both federal and state, must, by and large, be gathered from empirical documents concerning women's colleges in the United States.

The benefits to society of quality higher education for women finds precedent in this Court's holding in *Stanton v. Stanton*, 421 U.S. 7, 15, 95 S.Ct. 1373, 43 L.Ed.2d 688, 695 (1975):

> The presence of women in business, in the professions, in government and. indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

An analysis of recent scientific studies leads to the conclusion that women's universities and colleges have a unique place in the current scheme of higher education and provide opportunity for achievement for some female students who would be lost by the absorption of male students into the student body.

In Astin's *Four Critical Years*, an objective and comprehensive study of educational environments, the following findings are reported:

> Single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness. The latter is stronger at women's than men's colleges. Men's and women's colleges also have a positive effect on intellectual self esteem. Students at single-sex colleges are much more satisfied than students at co-educational colleges with virtually all aspects of college life . . .
>
> Women's colleges have a number of unique effects. First, they facilitate artistic interest and political liberalism. More important, women are more likely to obtain positions of leadership, to become involved in student government, to develop high aspirations, and to persist to graduation if they attend a women's col-

lege. Alexander W. Astin, *Four Critical Years* (San Francisco: Jossey-Bass Publishers, 1978), at pp. 232-233.

Elizabeth Tidball, a Professor of Physiology at George Washington University Medical Center, has completed extensive research in the area of unique advantages offered to women by women's colleges. Her conclusions relative to achievements of graduates of women's colleges were cited with approval by the lower courts in *Vorchheimer v. School District of Philadelphia,* 532 F.2d 880, 882, n. 2 (3 Cir. 1975), *affirmed by a divided court,* 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed.2d 750 (1977). The studies concluded "that graduates of women's colleges are 2.3 times more likely to be recognized for career/volunteer achievement than are women graduates of co-educational institutions. The probability of a married graduate of a women's college being listed is almost three time greater than that of her co-ed counterpart." M. Elizabeth Tidball "A Question of Creative Involvement" *Mount Holyoke Alumnae Quarterly* (Fall, 1970), at p. 177. She attributes the greater measure of success achieved by graduates of women's colleges, in a large measure, to the role models provided by larger numbers of female faculty and administrators present at such schools:

> The greater achiever output from the women's colleges compared with co-educational colleges is highly significant. The overall comparison for the five decades indicated approximately a two-fold difference in achiever output for the two types of colleges. M. Elizabeth Tidball "Perspective on Academic Women and Affirmative Action" *Educational Record* 54 (Spring, 1973), at p. 132.
>
> The relationship between women faculty and achiever output from the two types of colleges demonstrate

strongly that adult women achievers are required to beget future women achievers: there were almost twice as many women faculty per 1,000 women students in women's colleges as in co-educational institutions . . . The significantly greater number of women's faculty/students at women's colleges may account in part for the statistically greater output of achievers at women's colleges . . .

These findings have considerable impact. While many educators have, for some time, thought the presence of role models was beneficial for young women, these data clearly indicate that the development of young women of talent into career-successful adults is directly proportional to the number of role models to whom they have access. . .

Male models for career aspiring men students have been abundant in the past and continue so today . . . During a period when enrollments of women have at least doubled in co-educational colleges, the advantages afforded women students and the wider society through optimization of their talents have been subverted by the concomitant failure to keep pace in the expansion of the ranks of women faculty. Id. at p. 133.

This hypothesis finds support in other earlier works:

The findings of the present research call attention to what is almost a sociological truism and yet, is often overlooked: That if young people are exposed for four years to institutional norms and values in the very milieux in which they are explicit and authoritative they will become socialized to the predominant values of that milieu and will come to acknowledge their legitimacy. The present study shows this occurs with regard to academic educational values. Rose K. Gold-

sen, et al, *What College Students Think* (Princeton: D. Van Nostrand and Company, Inc., 1960), at p. 198.

> Interacting frequently with faculty during the undergraduate years has positive impact on status needs, altruism, and musical and artistic interests . . . Student - faculty interaction has a stronger relationship to student satisfaction with the college experience than any other involvement variable. Alexander W. Astin, *Four Critical Years* (San Francisco: Jossey-Bass Publishers, 1978), at p. 223.

The extensive survey made of women's college presidents and faculty members with respect to attitudes in support of women's achievements is contained in a study just released in 1981 which includes a number of interesting conclusions. Quoting Dr. Jean Blocks' *Review of Studies of Sex Differentiated Teacher Behavior in Higher Education in General,* this study states:

> At the university level, survey studies of students attitudes reveal that female students more often report that their professors do not take their intellectual aspirations seriously and that they fail to socialize women in professional roles. Marcia K. Sharp, et al, *A Study of the Learning Environment at Women's Colleges* (The Women's College Coalition, 1725 K Street, N.W., Washington, D.C., 1981), at p. 8.

> Women's college advocates familiar with the outcomes associated with their colleges felt nevertheless that they lacked solid descriptive data necessary to the documentation of the environment common to women's colleges. There was felt need at women's colleges to be able to answer the questions so often posed to them, 'Other than the fact that all of your students are women, how are you different.' This report on the

> learning environment at women's colleges is based on a survey of presidents and faculty conducted in the Spring of 1980 . . . in an effort to further our understanding of the ways in which educational environments can encourage women's development and achievement. Id. at p. 9.
>
> The vast majority of women's college presidents surveyed listed one of the following as the special mission of a women's college: 1) provide supportive atmosphere geared to women's needs; 2) encourage women to take leadership roles; 3) develop self confidence, independence and self respect in women students; 4) prepare for new roles, fight stereotypes and equalize opportunities; 5) prepare for adjustment to society/equality. Id., at p. 27.

These goals were likewise identified by a large percentage of faculty from women's colleges surveyed. Among the numerous interesting statistical data in this document, are these which we think support this argument: 84% of all faculty said that they had added material to their course syllabi to recognize the contributions and perspectives of women; 78% indicated they had discussed the representation of women in materials related to their disciplines and 84% had studied within the last year of research in their fields especially related to women. Marcia K. Sharp, et al, *A Study of the Learning Environment at Women's Colleges* (The Women's College Coalition, 1725 K. Street, N.W., Washington, D.C., 1981), at p. 40. Virtually all of the faculty members interviewed indicated a special adaptation of their courses to the needs and ambitions of women students. This is obviously an atmosphere of education which cannot be duplicated in a co-educational institution.

The Ford Foundation and Rockefeller Family Fund Study concluded that men at co-ed institutions receive more career directed information from faculty members than do women. *Men and Women Learning Together: A Study of College Students in the Late 1970s*, Report of the Brown Project, Brown University, April, 1980.

The vastly greater number of women in positions of academic influence and role models in women's colleges is shown by the study of women faculty members included in *A Second Profile of Women's Colleges* by the Women's College Coalition in which we find:

> In four year women's colleges, women constitute 43% of the full professors while in four year institutions excluding women's colleges, women only comprise 11% of full professors. With respect to associate professors women constitute 49% in the women's colleges and only 19% in the co-educational institutions. For assistant professors women comprise 59% in women's colleges versus 33% in co-educational colleges. Women instructors constitute 74% of all instructors in women's colleges, 51% in co-educational colleges. In all faculty ranks women make up 55% of the faculty in women's colleges, only 25% in co-educational colleges. *A Second Profile of Women's Colleges* (The Women's College Coalition, 1725 K Street, N.W., Washington, D.C., 1981), at p. 88.

Ms. Tidball makes the additional point that the presence of male students has a strong negative influence on the achievement of women students.

Quoting from Tidball:

> The correlation between women achievers and both men students and the total number of men in the college environment were statistically significant and neg-

ative. Men students accounted for the major input to the negative correlation; the correlation coefficient for the percentage of men enrolled and women achievers has a negative value of –0.937 and high statistical significance . . . As the percentage of men students increased, the output of women achievers decreased proportionately.

* * *

Thus men students and women faculty emerge as primary determinants of the number of women achievers. The fact that the women's colleges have none of the former and more of the latter than co-educational institutions may largely explain their significantly greater contribution to the wider society of career-successful women during the past 50 years.

* * *

Although little is 'natural' about any college environment, perhaps the argument for co-education which relies on this catchword can now be seen in a clearer light: 'natural' in our culture means the preparation of men for careers and the opportunity for women to become exclusively their wives and the mothers of their children. It should be apparent that this kind of 'naturalness' leads but to the maintenance of a sexist society. M. Elizabeth Tidball "Perspective on Academic Women and Affirmative Action" *Educational Record* 54 (Spring, 1973), at p. 134.

This same idea was advanced very forcefully by Adrienne Rich in her book *Toward a Woman's Centered University*:

The co-educational college mission statement that professes to 'develop the whole man' probably does exactly that. This is no semantic game or trivial accident of

language; what we have at present is a man-centered university a breeding ground, not of humanism, but of masculine privilege. Adrienne Rich, *Toward a Woman's Centered University, On-Lies Secrets and Silence* (New York: W. W. Norton and Company, 1979), at p. 127.

The different treatment of men and women under the M.U.W. admissions standard reflects, not archaic and over-broad generalizations, but instead dramatizes that male and female students and/or graduates are not often similarly situated in the educational arena or market place.

II.

The Court of Appeals Was Incorrect in Its Interpretation and Application of 20 U.S.C. § 1681 (a) (5), Title IX, Education Amendments of 1972, to This Action, Because the Clear Language and Legislative History of the Federal Statute Support the Continued Existence of Mississippi University for Women As a Single-Sex Institution

Throughout this litigation it has been the consistent position of Mississippi University for Women that it is the direct benefit of specific congressional legislation which, on its face, permits the institution to exist as it has in the past. Simply stated, Mississippi University for Women contends that it is entitled to continue as a university for women discriminatory in admissions solely on the basis of sex. The foundation for the argument is contained in 20 U.S.C. § 1681, et seq., Title IX, Education Amendments of 1972, as passed by the Congress pursuant to § 5 of the Fourteenth Amendment to the Constitution.

This Court has been previously called upon to interpret 20 U.S.C. § 1681, et seq., in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

However, this is the first instance presenting the question of whether certain of its provisions constitute a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment.

> The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point must be the language of the statute itself.' *Lewis v. United States,* 445 U.S. 55, 60, 100 S.Ct. 915, 63 L.Ed.2d 198, 206 (1980). (Citations omitted).

In pertinent part, 20 U.S.C. § 1681 (a) (5) states:

> In regard to admission this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually form its establishment has had a policy of admitting only students of one sex;

There can be no doubt that Congress is authorized under § 5 of the Fourteenth Amendment to determine what measures need to be taken to enforce the guarantees of equal protection. *Katzenbach v. Morgan,* 384 U.S. 641, 650-658, 86 S.Ct. 1717, 16 L.Ed.2d 828, 835-840 (1966). The language of the statute, § 1681 (a) (5) - which expressly identifies a class of educational institution Congress intended to benefit - obviously does not restrict or deny any right, but in effect extends a protection to a specified group, and therefore "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable." 384 U.S. 641, 657. This application is also true in cases involving gender classification. *Schlesinger v. Ballard,* 419 U.S. 498, 508-509, 95 S.Ct. 572, 42 L.Ed.2d 610, 618-619 (1975); *Kahn v. Shevin,* 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed.2d 189, 193 (1974).

Further, *Cannon v. University of Chicago,* supra, addresses the focus and intent of Title IX. There is little

doubt that the enactment of this specific legislation was nothing more than affirmative action for females. In *Cannon*, at 441 U.S. 677, 694-695, appears:

> Title IX is patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class.

Also,

> Title IX embodies a national commitment to the elemination of discrimination based on sex, a goal the importance of which has been recognized repeatedly by our decisions. *Cannon*, supra, 441 U.S. 677, 747 (Powell, dissenting, citations omitted).

Since Title IX is, but for one change, identical to Title VI, § 1681 (a) (5) is a permissible gender-based statutory exception to the Fourteenth Amendment by virtue of and of the authority granted to Congress under § 5 of the Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-457, 96 S.Ct. 2666, 49 L.Ed.2d 614, 620-622 (1976).

Legislative history surrounding the passage of Title IX clearly suggests congressional intent to permit colleges and universities to remain single-sex. The specific language in question was added by way of a floor amendment, with minimum discussion and/or reporting reference. See *Lewis v. United States*, 445 U.S. 55, 62, 100 S.Ct. 915, 63 L.Ed.2d 198, 207 (1980). The statutory language is the result of efforts by Senator Bentsen of Texas 118 Cong. Rec. 5814 (1972). In offering his amendment, the Senator made the following remarks in support thereof; there can be little doubt of what the purpose of his amendment was.

> Mr. President, the purpose of my amendment is to exempt from the Bayh amendment the undergraduate admissions policies of public institutions of higher education which have from their establishment been 'traditionally and continually' for students of only one sex.
>
> I am informed there are only four of these institutions in the country, one in Texas, two in Virginia, and one in Mississippi . . .
>
> Texas Women's University had no wish to admit men and is forbidden by State law from doing so. If the Bayh amendment were agreed to and survived in conference, this institution would have to go to court to fight for its right to continue to exist as a women's institution. I do not think it should have to do that. The women attending this institution do so voluntarily because they wish to have the experience of attending an all-female institution. If they did not want to attend, they could go to North Texas State or another institution of higher education in Texas.
>
> Is this really a civil rights issue? I do not think in this instance it is. Texas Women's University has a higher percentage of minority students than any institution in the State. It has a cohesiveness that other institutions do not have. It is a unique and distinctive institution, and it should be allowed to exist.
>
> Quite frankly, the problem is this: If the Bayh amendment passes, the pressures will build for the college to admit men, and what will be accomplished? Very little, compared to what could be lost.

The amendment passed the Senate without objection, with the approval of the floor manager for the bill, Senator Bayh. 118 Cong. Rec. 5815 (1972).

There are differences in the House version. In conference the House receded and accepted the Senate bill, including the Bentsen Amendment. Conf. Rep. No. 798, 92d Cong., 2nd Sess. ....., reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 2608 at 2671.

Inasmuch as Senator Bentsen was sponsor of the amendment which became part of the final enactment, his statements have been held to be "clearly probative of legislative judgment." *Simpson v. United States*, 435 U.S. 6, 13, 98 S.Ct. 909, 55 L.Ed.2d 70, 77 (1978). Therefore, notwithstanding the factual distinctions made by the panel, 646 F.2d 1116, 1118-1119, and the conclusion of the Court of Appeals on rehearing, 653 F.2d 222, 223, a reading of the statute's history and language demonstrates that 20 U.S.C. § 1681 (a) (5) is an intentional exception to the gender-based prohibitions addressed in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) and its progeny, permissible under § 5 of the Fourteenth Amendment for the purpose of affirmative action for women in the United States.

Title IX of the Education Amendments is the primary legislative enactment relating to discrimination in higher education. Through Title IX, Congress has stated affirmatively that it is the Nation's policy that traditionally single-sex colleges be allowed to maintain their enrollment policies. This congressional policy would be nullified if the opinions of the Court of Appeals are affirmed. Congress intended no such Hobson's choice. Indeed, the contrary is true - Congress has stated that women's colleges are not only lawful but are encouraged and assisted by the federal government in the accomplishment of affirmative academic goals.

CONCLUSION

The admissions policy of Mississippi University for Women is constitutionally permissible. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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Respondent's Brief

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No. 81-406

IN THE

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OCTOBER TERM, 1981

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v.

JOE HOGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether petitioners have sustained their burden of proving that Mississippi University for Women's single-sex admissions policy is substantially related to an important governmental objective.

2. Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5), constitutes a congressional determination under § 5 of the Fourteenth Amendment that single-sex colleges do not violate the Equal Protection Clause; if so, whether Congress has the constitutional power to make such a determination.

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---

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Mississippi Legislature established Mississippi University for Women (MUW) in 1884 as an exclusively female institution to provide its students with, *inter alia*, "a thorough normal school education, together with a knowledge of kindergarten instruction, . . . telegraphy, stenography and photography, . . . drawing, painting, designing, and engraving . . . fancy, practical and general needle-work . . . [and] bookkeeping, [and] such other practical industries" as might be needed to prepare "girls for the practical industries of the age." Miss. Laws 1884, ch. 30.

Since its establishment, MUW has admitted only female students for credit courses. It is today the only remaining tax-supported college or university in the

United States to retain such a policy.[1] Of Mississippi's eight public universities and 16 public junior colleges, only MUW employs sex as a criterion for admission; no Mississippi university or junior college admits only male students. Mississippi's Legislature and the Board of Trustees of Institutions of Higher Learning, the governing board of all Mississippi universities, have reviewed and reaffirmed MUW's purpose and single-sex policy in recent years.[2]

MUW has had 10 presidents since its founding; all have been men. The University's curriculum now includes offerings leading to 15 degrees, 11 of which are in the fields of nursing, music, medical technology, fine arts, education and social work.[3]

Although MUW strictly adheres to its all-female enrollment policy for students receiving academic credit, it does permit men to audit courses. In the past 10 years, at least 138 such courses were taken by men. Auditing students at MUW participate fully in classes and in many other campus activities, although they receive no academic credit for their work.[4]

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[1] U.S. DEPARTMENT OF EDUCATION/OFFICE FOR CIVIL RIGHTS, DATA OF EARNED DEGREES CONFERRED BY INSTITUTIONS OF HIGHER EDUCATION BY RACE, ETHNICITY AND SEX, ACADEMIC YEAR 1978-79, at 69, 72.

[2] Miss. Code Ann. § 37-117-3 (1972); Ex. 3, docu. 2; Transcript of Preliminary Injunction Hearing 6, 11 [hereinafter Tr.].

[3] Bulletin of Mississippi University for Women 1980/81 at 7-8, 52 [hereinafter Bulletin]; Ex. 1, Tr. 3-4.

[4] Tr. 38-45; Deposition of James W. Strobel 46-50; 56-63; Answer 11 to MUW's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. Because this case is here on certiorari from the District Court's summary judgment, this Court may properly consider all depositions and interrogatories filed in the case. See *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2716, 2722 (1973).

Respondent Joe Hogan is a resident of Columbus, Mississippi, the city in which MUW is located. In September, 1979, he applied for admission to MUW's nursing program leading to a Bachelor of Science in Nursing.[5] MUW advised Hogan that he would be permitted to attend any course offered at the University, but would receive no academic credit for his efforts. Tr. 26. Although two other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing—the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus—Hogan testified that he wished to attend MUW so that he would not be forced to sell his house, lose his job and move his family.[6]

Although fully qualified for admission to MUW's nursing program, Hogan was denied admission solely on the basis of his sex. Tr. 8, 11.

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[5] Tr. 17, 20. This was Hogan's second attempt to attend MUW. In August, 1976, he telephoned the University to inquire about enrollment in its nursing program but was advised that, because he was a man, his application would be summarily rejected. Tr. 14-15. Accordingly, Hogan furthered his education by commuting to Itawamba Junior College, located 62 miles from Columbus. Although the experience was physically grueling for a man with a full-time job, Hogan persisted and obtained all credits available to him at the junior college level. See Tr. 15-18.

[6] Q. And why have you not enrolled in either of those schools?

A. I am currently employed at the [Golden Triangle] Medical Center. I am a supervisor on the evening shift. I am well established. I have been there for—ever since 1973—or '74 off and on. I'm well known. I'm respected. I like where I work. And I just don't see the need in having to go a hundred and fifty miles or more to attend a nursing program when there's one right in my town. And to do that, I would have to move. I'd have to sell my house. I'd have to move my whole family, my wife, to Jackson. That would be a real extreme hardship on me to have to do that.

Tr. 19.

Following a complaint alleging that MUW's single-sex policy violated Hogan's rights under the Equal Protection Clause of the United States Constitution,[7] the District Court held an evidentiary hearing on Hogan's motion for a preliminary injunction. At the hearing, documentary evidence was introduced by stipulation, and attorneys for Hogan presented testimony by three witnesses. Although extended a full opportunity to do so, MUW declined to offer additional proof. Tr. 2-10, 66.

After hearing, the District Court denied Hogan's motion, finding that MUW's gender-based discrimination was "not arbitrary" but bore a "rational relationship to Mississippi's legitimate interest in providing the greatest practical range of educational opportunities for its female student population." Petition for Certiorari A-3. The District Court also granted Hogan 20 days within which to tender a dispute of material fact. When no additional factual material was submitted, the District Court entered summary judgment against him.

Hogan appealed from both rulings. Dismissing as moot Hogan's appeal from denial of the preliminary injunction motion, the Court of Appeals reversed the District Court's summary judgment. The Court of Appeals found the District Court's choice of the "rational relationship" test improper and held that "gender-based classifications must be substantially related to important governmental objectives in order to withstand constitutional challenge." *Hogan* v. *Mississippi University for Women*, 646 F.2d 1116, 1118 (5th Cir. 1981).

The Court of Appeals identified two constitutional flaws in MUW's single-sex policy. First, the Court noted that the enabling legislation creating MUW, relied upon by the State as the sole justification for its single-sex policy, was "based on role concepts for women that are

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[7] The Complaint also alleged a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* This portion of the claim has been abandoned, Tr. 80, although MUW now asserts a Title IX defense of its policy.

no longer acceptable . . ." 646 F.2d at 1118. Moreover, the Court of Appeals found that Mississippi's provision of single-sex education for female nursing students, without corresponding single-sex education for similarly situated males, was constitutionally objectionable. Although agreeing that Mississippi has "a significant and traditional purpose of providing for the education of all of its citizens[,]" the lower court held that the State's policy of "providing a unique educational opportunity for females but not for males . . . does not bear a substantial relationship to this important objective." 646 F.2d at 1119.

MUW filed a timely petition for rehearing and suggestion for rehearing *en banc*, arguing that Congress had approved single-sex institutions such as MUW by enacting 20 U.S.C. § 1681(a)(5) pursuant to its enforcement power under § 5 of the Fourteenth Amendment. The Court of Appeals rejected this argument:

> Congress may indeed enforce the fourteenth amendment by virtue of section five thereof, but this enactment does not purport to and could not allow states to maintain practices otherwise violative of that amendment.

653 F.2d at 223.

SUMMARY OF ARGUMENT

This action does not challenge the constitutionality *per se* of single-sex education. The record will support no decision on this issue. The narrow question presented is whether petitioners have met their burden of demonstrating that MUW's refusal to admit Joe Hogan, solely on account of his sex, is "substantially related to achievement of [important governmental] objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

Petitioners' sole constitutional justification for their single-sex policy is that this institution is intended to compensate women for past discrimination by providing them with educational benefits which would be unavailable in a coeducational environment. Because this argu-

ment was not raised at any stage below or in the Petition for Certiorari, it cannot be considered now.

In any event, the plain language of MUW's enabling legislation demonstrates that the University was not established to compensate women or to eliminate disparities in men's and women's education and career opportunities. Rather, MUW's manifest purpose has always been to prepare women for domestic duties and traditionally "female" vocations.

This conclusion is reinforced by evidence of an enduring pattern of official discrimination against women which has prevailed in Mississippi for more than a century. Historically, Mississippi has denied women the vote, exempted them from jury duty, and established other educational systems which emphasize that a woman's place is in the home. State law is replete with statutes reflecting an attitude favoring male dominance and leadership, and female support and domesticity.

Moreover, MUW is not operated to promote the goals it belatedly asserts. Petitioners claim that the large numbers of female administrators and faculty members at all-women's colleges provide role models which inspire their students. But no woman has ever been president of MUW, and the University's administration and faculty are male-dominated. Similarly, MUW's curriculum is heavily weighted in subjects leading to traditionally "female" careers; few offerings are available in fields dominated by men. In any event, admission of Joe Hogan would not prevent MUW from selecting its curriculum or alter the University's employment policies toward female administrators and faculty members. In these and other respects, the University does not need to remain a single-sex institution in order to practice affirmative action for female students.

MUW's claim that the presence of male students adversely affects the academic performance of female students is unsupported by the record, which shows that the presence of men would have no such effect at the

University. Moreover, to bar men from MUW because women are unable to compete with them stigmatizes women with an implication of female inferiority similar to that judicially noted in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Women injured by decades of condescension are not cured by a continuation of those policies. In any event, the sincerity of petitioners' views on this score is belied by MUW's longstanding practice of permitting men to attend and participate fully in classes at the University, but without receiving academic credit.

No proof exists that MUW's single-sex status benefits its students. Petitioners' operation of all other Mississippi universities as coeducational institutions demonstrates that even they do not regard single-sex education for women as essential. The unanimous rejection of single-sex education for women by every other public institution of higher learning in the United States is convincing proof that MUW's policy is unnecessary for any important governmental purpose.

The professional literature on which MUW relies contains serious defects. A substantial body of opinion supports the conclusion that single-sex education possesses no advantages over coeducation. In any event, the wide variations among colleges and universities which have historically educated women make generalizations about their purpose and function impossible. Only facts directly relevant to the purpose and operation of MUW are probative here.

By maintaining MUW as an all-female school, without operating an equivalent all-male university, petitioners offer to Mississippi women an opportunity—to participate in a single-sex educational program—which is unavailable to Mississippi men. Without proof that only women benefit from a single-sex environment, and that coeducation is superior for men, petitioners have failed to justify this gender-based discrimination. Indeed, petitioners argue that both men and women benefit from single-sex education. If this is so, petitioners' failure to make such an education equally available to men is irrational and

therefore constitutionally objectionable under any standard of equal protection review.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5), does not constitute a congressional determination under § 5 of the Fourteenth Amendment that single-sex colleges and universities do not violate the Equal Protection Clause. In any event, although § 5 gives Congress power to enforce the Equal Protection Clause, it grants no power to restrict or dilute its guarantees. If MUW's single-sex policy would otherwise violate the Equal Protection Clause, Congress has no power under § 5 to change this result.

ARGUMENT

I. MUW Has the Burden to Prove That Its Single-Sex Policy Is Substantially Related to Important Governmental Objectives

This action was not brought to challenge the constitutionality of single-sex education in all its manifestations. The Court of Appeals did not hold single-sex institutions unconstitutional *per se*, and the record provides no basis for a decision by this Court on such a sweeping ground. Rather, the narrow question presented is whether MUW has sustained its constitutional burden of demonstrating that its refusal to admit Joe Hogan, solely on account of his sex, is substantially related to an important governmental objective which cannot be as well achieved without this discrimination.

The governing constitutional standards are clear. Gender-based legislative classifications such as MUW's receive rigorous constitutional review. Recognizing that such classifications are often supported only by notions of female inferiority, this Court has established "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Changing realities judicially noticed by the Court support the standard of review:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

Stanton v. *Stanton*, 421 U.S. 7, 14-15 (1975).

In this constitutional inquiry, the burden rests with MUW to justify its policy. This Court requires those who seek to uphold gender-based discriminations to prove that the classifications are substantially related to achievement of important governmental objectives. *Kirchberg* v. *Feenstra*, —— U.S. ——, 67 L.Ed.2d 428 (1981); *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Craig* v. *Boren*, 429 U.S. at 204. The burden is a heavy one; MUW's refusal to admit Hogan solely on the basis of his gender "require[s] an exceedingly persuasive justification to withstand a constitutional challenge. . . ." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979); *accord*, *Kirchberg* v. *Feenstra*, —— U.S. ——, 67 L.Ed.2d at 434.

That MUW's policy on its face disfavors men and not women makes no difference. Many statutes which purport to favor women are based on and perpetuate the kinds of "old notions" and "archaic and overbroad generalizations" about women which this Court has repeatedly condemned. Further, all gender-based discriminations "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their needs for special protection." *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). Accordingly, these principles apply whether the classification under review nominally favors men or women. *Craig* v. *Boren*, *supra*; *Orr v. Orr*, 440 U.S. at 278-79; *Caban* v. *Mohammed*, 441 U.S. 380 (1979).

II. MUW's Arguments Were Not Raised Below and Cannot Be Presented Here

MUW has now identified a compensatory goal for its admissions standard, contending that limiting its enrollment to women "addresses a national commitment to eliminate, in this case compensate for, past discrimination due to sex." Brief for Petitioners 7-8. MUW views its policy as "nothing more than educational affirmative action for females." Brief for Petitioners 7. To relate its admissions policy to its stated objective, MUW argues that women receive benefits from a single-sex educational experience that are unavailable in a coeducational environment.

Neither of these contentions was raised below. Both in the District Court and the Court of Appeals, MUW defended its policy solely by relying on the purposes recited in the 1884 legislation establishing the school. See Answer 3 to MUW's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. Even in its Petition for Certiorari, MUW supported its single-sex status solely by reference to the purposes described in its organic legislation; no compensatory goal was proffered. See Petition for Certiorari 7-8. Nor was any argument raised below that single-sex education for women was superior to coeducation.

Not only does the eleventh-hour nature of these contentions reflect on their merit, *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977), but arguments not raised below and not passed upon by either the District Court or the Court of Appeals are not considered for the first time here. *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 n.11 (1975); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 197 n.13 (1974). To raise these contentions here for the first time seriously prejudices Hogan, who has had no

occasion or opportunity to present contrary evidence or to cross-examine the "experts" now relied upon by petitioners. Further, MUW's failure to present these issues at any earlier stage of the proceedings has produced a record virtually devoid of significant proof on which this Court might rely. MUW cannot now seek reversal without having offered the expert evidence needed to support an informed decision by this Court. See *Castaneda* v. *Partida*, 430 U.S. 482, 488-89 n.8 (1977). MUW's failure to present any evidence to support its newly-discovered contentions—and the lack of any other basis for its policy—should result in affirmance of the judgment of the Court of Appeals. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978).

III. MUW's Exclusion of Men Is Unrelated to Any Important Governmental Objective

Even if considered, MUW's arguments provide no basis for reversal. It is true that this Court has recognized that "[r]eduction of the disparity in economic conditions between men and women caused by the long history of discrimination against women [is] an important governmental objective" sufficient to support an otherwise proper gender-based discrimination. *Califano* v. *Webster*, 430 U.S. 313, 317 (1977). But MUW's "recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975).

Before such a purpose may serve as an acceptable basis for gender-based discrimination, it must appear that the legislation was *in fact* enacted to remedy past discrimination against women. *Orr* v. *Orr*, 440 U.S. at 280-81 and nn.10, 11 (1979); *Califano* v. *Webster*, 430 U.S. at 317; *Califano* v. *Goldfarb*, 430 U.S. 199, 212-216 (1977) (plurality opinion). Hypothesized justifications for such enactments are unacceptable, and this Court has settled that it "need not in equal protection cases accept at face value

assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. at 648 n.16.

The Court must also inquire whether the classification at issue actually operates to achieve its asserted purpose. If MUW's policy has no substantial relationship to the goal ascribed to it, or if it perpetuates sex stereotypes, it cannot withstand constitutional scrutiny. *Califano* v. *Goldfarb*, 430 U.S. at 209 n.8; *Orr* v. *Orr*, 440 U.S. at 280-81; *Califano* v. *Webster*, 430 U.S. at 317.

Further, petitioners must demonstrate that their goals cannot be promoted as well by carefully structured gender-neutral policies:

> [E]ven statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

Orr. v. *Orr*, 440 U.S. at 283.

A. *MUW Was Not Established for Compensatory Motives*

MUW was manifestly not created to compensate Mississippi women for past discrimination. MUW was established by the Mississippi Legislature on March 12, 1884. Miss. Laws 1884, ch. 30. Originally known as the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi in the Arts and Sciences, MUW's purpose is clearly stated in the enabling legislation:

> the establishment and maintenance of a first-class Industrial Institute and College for the education of white girls of the State of Mississippi, in the arts and

> sciences, at which such girls may acquire a thorough normal school education, together with a knowledge of kindergarten instruction, also a knowledge of telegraphy, stenography and photography; also a knowledge of drawing, painting, designing, and engraving in their industrial application; also a knowledge of fancy, practical and general needle-work; and also, a knowledge of bookkeeping, with such other practical industries as, from time to time, to them may be suggested by experience; or tend to promote the general object of said Institute and College, to-wit: fitting and preparing such girls for the practical industries of the age.

Miss. Laws 1884, ch. 30.

Without significant alteration, and as MUW concedes, this statutory declaration of purpose remains in effect today, guiding MUW's mission. Miss. Code Ann. § 37-117-3 (1972); see Petition for Certiorari 7-8. The Court of Appeals was quick to discern the nature of the enabling Act: "[T]his statute is based on role concepts for women that are no longer acceptable to many . . ." 646 F.2d at 1118.

Although statutory history materials are not available for Mississippi, the plain language of MUW's charter demonstrates that the University was not intended to redress "old notions" and "archaic and overbroad" assumptions about the role of women; nor was it intended to offer to Misissippi women the same educational opportunities available to Mississippi men. Rather, MUW was and remains a manifestation of the kind of thinking that diverts women into roles traditionally regarded as "female." [8] That this is so is hardly surprising. As Justice Stevens has noted, "a discrimination of that vintage cannot reasonably be supposed to have been motivated by a

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[8] We have found no evidence that other Mississippi institutions of higher learning have ever been commanded by the Legislature to educate their students in kindergarten, stenography, needlework, and bookkeeping to prepare them for "the practical industries of the age."

decision to repudiate the 19th century presumption that females are inferior to males." *Califano* v. *Goldfarb*, 430 U.S. at 223 (1977) (Stevens, J., concurring).[9] MUW

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[9] If not universal, the purposes for which MUW was founded are at least not unique to Mississippi. The history of women's education in the United States demonstrates that sex-segregated education, both at the high school and college levels, was often not intended to prepare women for the leadership roles for which male students were prepared, but to teach social graces, rudimentary reading skills, homemaking and motherhood roles, and to prepare women for careers as teachers in the lower schools. 1 T. WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 519-51 (1929); Comment, *Plessy Revived: The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. CIV. RTS.—CIV. LIB. L. REV. 585, 599-602 (1977). As these and other works make clear, arguments against coeducation were often based on stereotypical thinking about women:

> These arguments, in brief, were that the students and professors did not want women present, that coeducation would either coarsen and destroy 'feminine sensibilities' or feminize the colleges, that morals would be lowered and distinctions between the sexes eliminated, and that the intellectual standards of the colleges would be lowered, either because of women's intellectual inferiority or because of concessions to their weaker physical constitution which would not be able to withstand the rigors of higher education.

Comment, *Plessy Revived, supra*, 601-02 (1977) (footnote omitted); *accord*, M. NEWCOMER, A CENTURY OF HIGHER EDUCATION FOR AMERICAN WOMEN 25-31 (1959); Husbands, *Women's Place in Higher Education?*, 80 SCH. REV. 261, 269 (Feb. 1972).

The motivation behind creation of many sex-segregated colleges and universities is strikingly similar to that which supported separate education for blacks: that women are inferior, and that their intellectual and occupational needs are different from those of men. See G. MYRDAL, AN AMERICAN DILEMMA 1077 (20th anniversary ed. 1962). Maintenance of sex-segregated schools may reinforce and maintain this myth. Note, *Single-Sex Public Schools: The Last Bastion of "Separate But Equal"?* 1977 DUKE L.J. 259, 272 (1977); Comment, *Plessy Revived, supra*, 641.

Single-sex education was once the dominant mode of higher education for women. Its public acceptance coincided with an era in American life in which discrimination against women was

has adduced no evidence to the contrary and points to no evidence which casts any light on the reasons behind MUW's creation.

Moreover, MUW's establishment cannot be viewed in historical isolation. The actions of the Mississippi Legislature in other contexts effectively refute the notion that the 1884 Legislature was animated by a desire to eliminate disparities in the role of men and women in Mississippi society. Instead, history demonstrates that precisely the opposite view prevailed, both then and for decades afterward, and that MUW's creation and maintenance constitute part of a larger pattern of historical sex discrimination by the State of Mississippi.

For example, in 1884, and until ratification of the Nineteenth Amendment, Mississippi denied women the vote. Indeed, the State has never adopted the Amendment. See MISS. CONST. of 1869, art. VII, § 2; MISS. CONST. of 1890, art. 12, § 241. In 1884, and until 1968, Mississippi excluded women from jury duty. See Hutchinson's Code of 1848, ch. 61, art. 1; Miss. Laws 1962, ch. 308; Miss. Laws 1968, ch. 335. This statutory prohibition was judicially approved by the Supreme Court of Mississippi in a 1966 opinion which gave the following explanation of the legislative purpose:

> The legislature has the right to exclude women so they may continue their service as mothers, wives and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.

State v. *Hall*, 187 So.2d 861, 863 (Miss. 1966).

Other laws long in force in Mississippi reflect the prevailing attitude that a woman's proper role is far differ-

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prevalent. As sex discrimination in our society has subsided, so too has the single-sex school for women. *See* M. NEWCOMER, *supra*, at 5-38.

ent from that of a man. In 1926, Mississippi established a coeducational system of agricultural high schools intended to "teach theoretical and practical agriculture and home economics." Miss. Code Ann. § 37-27-19 (1972); Miss. Laws 1926, ch. 326. In 1928, standards were established for these schools, including a requirement that "[a]ll girls who graduate from an agricultural high school must demonstrate their ability to make their own clothes, prepare and serve meals, and do other things necessary to ordinary household management." Miss. Laws 1928, ch. 293 at 369. This requirement remains in force today, Miss. Code Ann. § 37-27-19(o) (1972), demonstrating the State's attitude that a woman's place is in the home.

Until 1978, Mississippi's Constitution required the state librarian to be a woman. *See* MISS. CONST. of 1890, § 106. As recently as 1962, the Mississippi Legislature was enacting legislation linking a wife's legal residence to that chosen by her husband, without any reciprocal provision. Miss. Laws 1962, ch. 355, *codified* Miss. Code Ann. § 37-103-15 (1972), *modified* Miss. Laws 1980, ch. 541. Even today, Mississippi law reflects nineteenth century notions that only men should hold public office; *wives* of public officials are prohibited from accepting bribes on behalf of their spouses—no such penalty exists for *husbands*.[10] By the same token, Mississippi in 1884 and today punishes male, but not female, tramps, see Miss. Code Ann. § 97-35-29 (1972); Miss. Code § 2960 (1880), and it has long been unlawful for a father knowingly to permit his minor son—but not his daughter—to carry a concealed weapon. Miss. Code Ann. § 97-37-15 (1972); Miss. Code § 2987

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[10] "If any officer, agent, or trustee shall accept any gift, offer, or promise, or if his wife, with his knowledge and consent, shall accept any gift, offer, or promise prohibited in the last section, he shall, on conviction, be forever disqualified from holding any public office. . . ." Miss. Code Ann. § 97-11-3 (1972). This gender-based prohibition has existed undisturbed for 90 years. See Miss. Code § 982 (1892).

(1880). These statutes clearly reflect the notion that males are aggressive and dominant; females are reticent and retiring.

Under the guise of protection of the weaker sex, Mississippi until this year limited the ability of women to work and support their families.[11] Similarly, by establishing age differences between the sexes which give extended protection to younger men, other Mississippi statutes reflect an attitude that males, unlike females, require training and education for future leadership roles. In 1884, and until 1980, it was a misdemeanor to persuade away from his parents for the purpose of employment any male child between the ages of 18-21. No such penalty attached in the case of a similarly situated female. Miss. Code § 2755 (1880); Miss. Code Ann. § 97-5-7 (1972), *modified* Miss. Laws 1980, ch. 357. In 1884, parental consent was required for marriages where the prospective groom was under the age of 21 or where the future bride was less than 18. Miss. Code § 1148 (1880). This gender-based distinction continues today, forbidding marriages which do not have both judicial approval and parental consent where the male is under the age of 17 or the female is under the age of 15. Miss. Code Ann. § 93-1-5(d) (1972).

In a State with such a longstanding and pervasive history of official sex discrimination, it cannot be believed, particularly in the absence of proof to the contrary, that the Mississippi Legislature's creation of MUW "addresses a national commitment to eliminate, in this case compensate for, past discrimination due to sex." Brief for Petitioners 7-8. This belated justification for MUW's establishment is no more than "a con-

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[11] Women could not be employed "in any laundry, millinery, dressmaking store, office, mercantile establishment, theater, telegraph or telephone office, or any other occupation not here enumerated more than ten hours per day or more than sixty hours per week. . . ." Miss. Code Ann. § 71-1-33 (1972); see Miss. Laws 1914, ch. 165. Tellingly, this limitation did "not apply to domestic servants."

venient, but false, post hoc rationalization." *Craig* v. *Boren*, 429 U.S. at 199 n.7.

B. *MUW's Single-Sex Policy Confers No Benefits on Its Students*

MUW has failed to demonstrate that maintenance of its single-sex policy is sufficiently related to its stated goal of closing the gap between men's and women's educational opportunities in Mississippi. Clearly, MUW is not now operating to compensate women students for past discrimination in education; nor is there anything to indicate that the University bestows important benefits on its students by virtue of its discriminatory policies. Instead, a review of MUW's 1980-81 Bulletin reveals a university which reinforces and maintains traditional assumptions about women.

Petitioners argue that women's colleges foster female achievement by providing increased numbers of female role models among the administration and faculty. Whatever the validity of this argument with respect to other schools,[12] MUW's administration is male-dominated. Since its founding in 1884, MUW has had 10 presidents. All have been men. Bulletin 7-8. MUW's administration is dominated by men. The President, Executive Vice President, Vice President for Academic Affairs, Vice President for External Affairs and Vice President for Financial Affairs are men, as are the Directors of Admissions, Personnel, Extended Studies, and the Library; so too are the Deans of the Schools of Education, Arts and Sciences and the Graduate School. Bulletin 245-247. The senior faculty too is heavily male. Bulletin

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[12] Claims that single-sex education benefits women through increased female role models are without empirical support. As Sandra Husbands has pointed out in a thoughtful article on women and higher education, "[t]here is no hard evidence that women serve as more effective role models than men for women college students." Husbands, *Women's Place in Higher Education?* 80 SCH. REV. 261, 268 (Feb. 1972). Husband's remark is particularly cogent here, where the record is barren of evidence bearing on this contention.

249-252. MUW has offered no evidence that its faculty and administration contain a higher proportion of females than other publicly-funded coeducational Mississippi universities. In any event, there is nothing in the relief sought by Hogan which would affect the composition of MUW's faculty or administration or alter the University's policies concerning recruitment and employment of female administrators and faculty members. Thus, this action poses no threat to any benefits provided by such role models; a gender-neutral enrollment policy would serve as well. See *Orr* v. *Orr*, 440 U.S. at 283.

By the same token, MUW's curriculum is demonstrably not adapted to compensate women for earlier discrimination or to encourage women to enter fields heretofore regarded as male domains. To the contrary, the curriculum perpetuates a concept that certain fields are traditionally female, with traditionally male roles remaining off limits. Of the 15 degrees offered by MUW, 11 are in the fields of nursing, music, medical technology, fine arts, education and social work—fields traditionally assigned to women. Bulletin 52. The remaining four degrees, in the more generalized areas of Arts and Science, are characterized by major fields of study chosen from offerings heavily weighted toward "female" occupations, in which women hardly need additional assistance to excel. See Bulletin 67-82, 119-127, 163-169, 198-211.[13] Equally significant are the limited

[13] For example, of the 17 specialized curricula offered by the School of Arts and Sciences, 15 are in the fields of music, music education, secretarial administration, physical education, drawing and painting, interior design, art education, commercial art, speech-language pathology, medical technology and social work. Bulletin 69-82. The Department of Business and Economics offers at least 20 secretarial and clerical courses, and less than 15 courses related to business management. Bulletin 101-07. Ironically, MUW's Interdepartmental sequence on the Contemporary Woman contains courses only on fashion, modeling and personal appearance. Bulletin 109.

offerings in areas such as engineering, architecture and physics, in which women have traditionally been underrepresented. In any event, nothing in this action would affect MUW's curriculum. Even if shorn of its single-sex policy, the University remains free to offer whatever courses it wishes and to continue to emphasize—if indeed it does—the special problems of women in society. Here, too, a nondiscriminatory enrollment policy would be no less effective than the current admissions standard.

MUW argues that the presence of male students adversely affects the performance of women. As with its other contentions, there is nothing in the record to support it. Nor does experience support the idea, implicit in this contention, that women college students are intimidated by men. See Husbands, *Women's Place in Higher Education?*, 80 SCH. REV. 261, 266-69 (Feb. (1972). Such evidence as the record contains suggests student performance does not vary with the sexual composition of the class. Tr. 60-61; Deposition of Nancy L. Herban at 6-8; Deposition of Annette Barrer at 7-8.

In any event, the assertion that women should be isolated in a single-sex environment because they are unable to compete with men is reminiscent of a similar argument concerning racially segregated education. This Court judicially knows it to be untrue. *Stanton* v. *Stanton*, 421 U.S. at 14-15. To the extent that any such gender-based differences exist, they derive from decades of sex discrimination, of which MUW is but a familiar example. It is irrational to suppose that women disadvantaged by years of condescension will now be assisted by an indefinite continuation of those same policies. To refuse to admit men to MUW in reliance on this argument stigmatizes women with an implication of female inferiority every bit as damning as that judicially noted in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

MUW's arguments on this score are particularly disingenuous in light of its policy of permitting men to

audit courses at the University. Such auditing students participate fully in the classes to which they are assigned and in many other campus activities. Tr. 38-45; Deposition of James W. Strobel at 46-50, 56-63. In the last 10 years alone, at least 138 audits of courses by men have occurred at MUW. Answer 11 to MUW's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. To the extent that petitioners believe that "the presence of male students has a strong negative influence on the achievement of women students[,]" Brief for Petitioners at 17, it is impossible to understand this audit policy.

There is no basis on which to conclude that women's ability to learn and achieve at MUW will be adversely affected by Joe Hogan's presence. Annette Barrer, Acting Dean of the School of Nursing at MUW, gave uncontradicted testimony that the presence of men in the nursing program would have no adverse effect on the performance of female students. Tr. 60, 61; Deposition of Annette Barrer at 7-8. Similarly, it is undisputed that the teaching of nursing is unaffected by the sexual composition of the class. Deposition of Annette Barrer at 6-7; Deposition of Nancy L. Herban at 4, 6.

Finally, as Ms. Barrer concedes, the field of nursing has long been dominated by women. Tr. 59; *see* Deposition of Nancy L. Herban at 5-6. There is no evidence that Mississippi or MUW has ever discriminated against female nurses or nursing students. In a profession which has not presented barriers to female participation, no theory of affirmative action or compensation for past discrimination applies. Insistence on a single-sex policy in a nursing program can only reflect MUW's desire to perpetuate certain professions as male or female preserves.

As noted, no evidence has been presented showing how the single-sex policy benefits MUW students. No proof was offered to compare the records and careers of MUW graduates with those of similarly situated female graduates of

other Mississippi universities. Indeed, the fact that 23 of Mississippi's 24 publicly funded junior colleges and universities are coeducational demonstrates that even petitioners do not regard single-sex education as necessary for effective learning or rewarding careers; it also belies petitioners' arguments concerning the superiority of single-sex education. The absence, throughout the United States, of even one other public college or university which limits its enrollment to females demonstrates convincingly that MUW's arguments are not accepted in American higher education and that the single-sex policy is not necessary to promote any governmental objective. Nor can it be said that MUW provides a therapeutic atmosphere for women with special problems not shared by their counterparts at coeducational institutions. There is no proof that MUW's students suffer from any such disabilities, or that the University makes any effort to limit its enrollment to women unable to function well in a coeducational environment.

In determining the substantiality of the connection between MUW's policy and the educational goals it seeks to attain, it is proper to consider the effect of that policy on another Mississippian seeking an education—Joe Hogan. Refusal to admit Hogan to MUW would work a serious hardship on him and his family. Tr. 19. Moreover, to the extent that MUW offers an excellent nursing education, as petitioners claim,[14] those unique qualities of MUW which underlie that education are unavailable to Hogan. See *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 629 (1950).[15]

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[14] Deposition of Nancy L. Herban at 7-8; Deposition of Annette Barrer at 19-20; Deposition of Harvey M. Craft at 12-14.

[15] Petitioners offered no proof to show that the nursing education Hogan might receive at the two publicly funded coeducational nursing schools was substantially equivalent to that available at MUW. Without such proof adduced by those who have the burden to make it, we cannot assume that equal educational opportunities are offered by the State elsewhere.

Petitioners' arguments concerning the value of women's colleges make no reference to MUW and consist largely of quotations from secondary sources purporting to find value in single-sex education. Brief for Petitioners at 12-19. Petitioners' material is seriously flawed[16] and does not in any event represent the complete body of professional thought on this question.[17]

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[16] Petitioners rely heavily on the work of Dr. Elizabeth Tidball, a professor of physiology without demonstrated training or experience in sociology or educational psychology. Dr. Tidball randomly selected women listed in *Who's Who Among American Women* between 1910 and 1950, compared their educational backgrounds and concluded that more had attended all-women's colleges than had attended coeducational colleges or universities. From this, Dr. Tidball concluded that specific attributes of women's colleges promoted career achievement.

The weaknesses in Dr. Tidball's work have already been demonstrated. See *Vorchheimer* v. *School Dist. of Philadelphia*, 400 F.Supp. 326, 329-30 (E.D. Pa. 1975); L. BAKER, I'M RADCLIFFE! FLY ME! THE SEVEN SISTERS AND THE FAILURE OF WOMEN'S EDUCATION 156-160 (1976); *Comment: Plessy Revived; The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. CIV. RTS.—CIV. LIB. L. REV. 585, 638-640 (1977). First, it is far from clear that *Who's Who Among American Women* is a reliable indicator of success. Second, because many of the best colleges and universities did not admit women at all during the period under review, Dr. Tidball's findings more properly reflect the fact that talented women, finding the doors closed at Harvard, Princeton and Yale, were forced to turn to Radcliffe, Bryn Mawr and Vassar. Dr. Tidball's failure to compare the academic quality of the single-sex and coeducational colleges and universities found in the study also detracts from its significance. Finally, it is apparent that nothing in Dr. Tidball's sampling focuses on the situation at MUW.

[17] A cursory review of the literature reveals substantial support for the view that single-sex education has no advantages over coeducation. Feather, *Coeducation, Values, and Satisfaction with School*, 66 J. OF ED. PSY. 9, 14 (1974); Miller & Dale, *A Comparison of the Degree Results of University Students from Co-educational and Single-Sex Schools*, 44 BR. J. OF ED. PSY. 307 (Nov. 1974); Dale & Miller, *The Academic Progress of University Students from Co-educational and Single-Sex Schools*, 42 BR. J. OF ED. PSY. 317 (Nov. 1972).

Further, where students at single-sex schools have been polled, they have been quick to favor coeducation. See Lester & Lester,

In any event, the landscape of women's colleges is as varied as the universe of higher education generally. Generalizations concerning the purpose, programs and effects of women's colleges are simply not possible. M. NEWCOMER, A CENTURY OF HIGHER EDUCATION FOR AMERICAN WOMEN 52-71 (1959). Some women's schools were formed to help prepare women for domestic duties. Others were designed to cultivate gentility and social graces. Still others had as their goal the preparation of women for careers ancillary to those of the husband as principal breadwinner. Finally, some have had as their aim the specific preparation of women for professional opportunities. 2 T. WOODY, A. HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 192 *et seq.* (1929). In any equal protection analysis of a specific university such as MUW, generalized statements of the kind quoted in petitioners' brief have only the most tenuous significance. Here, as elsewhere in law, there can be no substitute for exacting scrutiny of the particular policy at issue.

IV. By Failing to Operate an All-Male University, Petitioners Discriminate Impermissibly Against Men

Joe Hogan does not ask to attend an all-male college which offers a Bachelor of Science in Nursing; he asks only to attend MUW. Nevertheless, the fact remains that petitioners maintain an all-female university without providing a corresponding opportunity for all-male education.

Preliminary Note on a Search for Correlates of Attitudes toward Coeducation from Female College Students, 35 PSY. REP. 10 (1974); *Coeducation*, 82 COL. BD. REV. 17, 18-22 (Wint. 1971-72) (interview with Alan Simpson, the President of Vassar). These results suggest that students attend single-sex schools for reasons unrelated to their gender-based enrollment.

Such proof as exists indicates that coeducation may confer benefits on female students which single-sex education does not provide. Atherton, *Coeducational and Single-Sex Schooling and Happiness of Marriage*, 15 ED. RES. 221 (Dec. 1973). When single-sex schools go coed, beneficial changes result. H. HODGKINSON, INSTITUTIONS IN TRANSITION, 142-148 (1971).

By its maintenance of MUW as a single-sex institution for women, petitioners offer to Mississippi's female citizens a benefit—the opportunity to enroll in either a coeducational or single-sex educational program—which is unavailable to the State's male citizens, including Joe Hogan.

Since *Brown I*, this Court has recognized that "education is perhaps the most important function of state and local governments." 347 U.S. at 493. In denying educational opportunities to some of its citizens on the basis of sex, petitioners have a heavy burden to explain how their failure to maintain an all-male school, while supporting MUW, is substantially related to an important governmental objective. As the Court of Appeals noted, 646 F.2d at 1119, it will not do for petitioners to justify their policy by reference to the supposed needs of Mississippi's female citizens. If otherwise well taken, such arguments might provide a basis for maintenance of MUW; they do nothing at all to explain the State's failure to make a corresponding opportunity available to its male citizens.

Here, as in other aspects of this case, petitioners have failed to present proof that women, but not men, benefit from a single-sex environment; that for men, but not for women, a coeducational atmosphere is invariably superior. Indeed, petitioners' own arguments indicate that precisely the opposite is true. Relying on the work of Alexander Astin [A. ASTIN, FOUR CRITICAL YEARS, 232-33, 246 (1978)], petitioners contend that single-sex colleges have positive effects on their students. Brief for Petitioners at 12-13. But Astin's positive findings were as pronounced for men's colleges as for women's. To the extent that petitioners contend that single-sex education is superior to a coeducational experience, the irrationality of petitioners' failure to provide single-sex education for men becomes clear.[18]

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[18] Petitioners' failure to supply an equivalent all-male university distinguishes this case from *Williams* v. *McNair*, 316 F.Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), and *Vorchheimer* v.

Petitioners' failure to offer either proof or argument to justify its complete denial to Mississippi men of a benefit afforded Mississippi women [19] warrants affirmance of the judgment below on this independent ground.

V. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5), Does Not Legitimate MUW's Single-Sex Policy

Petitioners contend that in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5), Congress has exercised its enforcement power under § 5 of the Fourteenth Amendment to determine that single-sex schools do not violate the Equal Protection Clause. Congress has made no such determination. In enacting 20 U.S.C. § 1681(a)(5), Congress exercised its authority under the Spending Power [20] and simply declined to ex-

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School Dist. of Philadelphia, 532 F.2d 880 (3rd Cir. 1975), *aff'd*, 430 U.S. 703 (1977), on which petitioners relied in their Petition for Certiorari. Moreover, *Williams* was affirmed 5 years before *Craig* v. *Boren*, at a time when the rational relationship test of *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) prevailed in gender-based discriminations. The summary affirmance of *Williams* detracts significantly from its precedential value; *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-83 (1979); the affirmance in *Vorchheimer* is entitled to no precedential weight at all. *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972). Finally, in both *Williams* and *Vorchheimer*, the parties had stipulated to the educational value of sex-segregated education. 532 F.2d at 882; 316 F.Supp. at 137. Here, neither a stipulation nor any proof to support such a finding exists.

[19] Even if Mississippi women were entitled to preferential treatment as compensation for past discrimination, no affirmative action program has gone so far as to bar absolutely other groups from all opportunity for governmental benefits. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

[20] "Title IX was patterned after Title VI of the Civil Rights Act of 1964 . . . . [and] [t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been . . . ." *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-96 (1979). Title VI was expressly based on Congress' Spending Power and not on § 5 of the Fourteenth Amendment. 110 CONG. REC. 1521-28 (1964).

tend a statutory prohibition of sex discrimination to undergraduate higher education.

In any event, § 5 gives Congress power to enforce the guarantees of the Equal Protection Clause, but no power to restrict its reach. The draftsmen of the Fourteenth Amendment gave Congress in § 5 "the same broad powers [to enforce the Amendment as are] expressed in the Necessary and Proper Clause . . . ." *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966). In determining whether any enactment is "appropriate legislation" under § 5, the question is whether it "may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" 384 U.S. at 650. Thus, a legislative classification independently prohibited by the Equal Protection Clause cannot be immunized from constitutional scrutiny by Congress.

This Court has made clear that § 5 is intended to expand constitutional freedoms, not contract them:

> § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.

Katzenbach v. *Morgan*, 384 U.S. at 651 n.10.

Thus, where a state legislative enactment otherwise runs afoul of the requirements of the Fourteenth Amendment, neither § 5 nor any other provision of the Constitution gives Congress power to legitimate that enact-

ment. If MUW's policy cannot survive constitutional scrutiny aside from consideration of 20 U.S.C. § 1681(a)(5), that section is powerless to change this result. To hold otherwise would be to surrender to Congress authority to interpret the Fourteenth Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 81-406

In the Supreme Court of the United States

October Term, 1981

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL.,
Petitioners,

vs.

JOE HOGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. MISSISSIPPI'S STATUTE PRESCRIBING A SINGLE-SEX ADMISSION CRITERION FOR M.U.W. IS NOT PROHIBITED BY U.S. CONSTITUTION.

A. Respondent Failed To Meet His Burden To Prove That The Gender-Based Admissions Policy Bears No Substantial Relationship To An Important Governmental Interest.

Hogan filed his complaint and a motion for a preliminary injunction seeking certain judicial relief. Clearly the burden was his to prove at the December 22, 1980, hearing on his motion that continuation of the legislatively mandated admission policy was unconstitutional *i.e.*, bearing no substantial relationship to an important governmental interest. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). The case law is clear that he had the burden: *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). The award or denial of a preliminary injunction is a matter within the discretion of the trial court. *Meccano, Ltd. v. John Wannamaker*, 253 U.S. 136, 40 S.Ct. 463, 64 L.Ed. 822 (1920); *Yakus v. U.S.*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

Respondent Hogan relied largely on pleadings, discovery materials and his own testimony regarding inconvenience to him in attending a state nursing school which admitted males. The trial court determined that he had not proved his right to such an injunction and denied his motion on December 23, 1980. He was given additional time and opportunity by the Court to present evidence in support of his complaint (to show cause why summary judgment should not be entered for Defendants). He elected not to do so, presented nothing more and summary judgment was entered against him on January 21, 1981. The

Court of Appeals summarily reversed that order and rendered an order mandating an injunction permitting Hogan's admission.

The only evidence in the record as to whether or not the single-sex policy for M.U.W. is related to a legitimate state objective or is irrational (impermissible) is found in the testimony of President James Strobel:

> "A The position of the "W" is that is that the single-sex nature of its student body has encouraged not only leadership development, but a number of other developmental aspects, most prominently the academic development of its students, and that the environment at the institution has encouraged, indeed, a high level of performance on the part of its graduates, as testified by numbers of graduates entering graduate school, going on to professional degrees and their achievement in later life.
>
> "Q Specifically, you don't think that women would be able to achieve those leadership roles if men were admitted? That's the simple question.
>
> "A I would have to qualify an answer by saying that I think the level of achievement in leadership is enhanced by the role models that are there at the "W", by the environment of the classroom where women are totally encouraged to fulfill themselves in leadership as well as in academics.
>
> "Q And therefore, it would be diminished if men were present?
>
> "A Correct.
>
> "Q Well, you seem to feel that their roles would be diminished if men were present. That's what you feel the harm would be of admitting men. We're just trying to establish what exactly—
>
> "A In response to that, I would base our feeling about the environment that is offered by the "W" on

> a number of points, which are subscribed to by the Women's College Coalition, of which we are a part. And these points speak to the encouraging environment for women, particularly in areas of the sciences, as a part of a single-sex environment, where all opportunities are fully explored and brought to their attention. There is no problem with their realization of their potential."

The validity of that educational theory was never challenged or refuted by Hogan. No counter evidence was presented. Interrogatory No. 12 propounded by the plaintiff (respondent) to the defendants asked for production of "all studies, reports and surveys in your possession which support or indicate the existence of educational or other reasons supporting single-sex education." The answer stated that these documents were available to the plaintiff at the office of M.U.W.'s Vice President for External Affairs and could be copied. They were never inspected, copied or sought by the plaintiff and certainly never refuted.

B. Respondent's Contention That M.U.W.'s Arguments In Support Of Its Policy Were Not Raised Below And Cannot Be Presented Here Is Specious.

Respondent seems to assert that all that was required of him was to file a complaint and the defendants were then required to go forward with affirmative proof of every aspect of the facts and law. Defendants did offer proof through M.U.W.'s President at the hearing that the single-sex policy is related to the interest of Mississippi in providing an educational atmosphere where women can achieve their full potential: "the encouraging environment for women, particularly in the sciences." Rather than being made here for the first time, this argument is disputed here for the first time.

C. Respondent's Argument That M.U.W. Was Not Founded For Compensatory Motives As Allegedly Proved By Statutory Discrimination Against Women In Other Areas Is Irrelevant And Highly Inappropriate.

The question to be decided by this court is not how the establishment of Mississippi Industrial Institute and College in 1884 related to then current constitutional interpretations. It is, rather, whether the maintenance of Mississippi University for Women in 1980 is constitutionally permissible in light of present circumstances and educational concepts. The Respondent's brief simply indicts Mississippi for its many past sins relative to voting, jury service and vocational restrictions—nothing to do with whether the Strobel-advanced theories of today's educators who favor women's colleges are manifestly wrong. If M.U.W.'s single-sex policy finds rational support in educational circles, the legislative prerogative of maintaining it is constitutional. *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). Education is "perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873, 880 (1954); and not one for which courts should substitute their educational preferences for the legislatures. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

D. Respondent's Argument That M.U.W.'s Single-Sex Policy Confers No Benefits On Its Students Is Unsupported By Proof And Irrelevant To The Constitutional Issue.

The only factual refutation to President Strobel's testimony that an all female student body encourages women to fulfill their potential is found, not in the record before this court, but only in respondent's brief III B. It contains only the extrapolations of isolated statistics from the M.U.W.

bulletin and conclusions of the brief writer. It is readily admitted that the educational philosophy underlying M.U.W.'s existence "does not . . . represent the complete body of professional thought on this question" as respondent states on page 23 of his brief.

It is doubtful that any educational theory less basic than the need to read and write enjoys universal acceptance by all educators and social scientists around the globe. The standard of judicial review is not whether the justices agree with Elizabeth Tidball or Gunnar Karl Myrdal; it is whether there is any rational basis for the state legislature to adopt this approach to meet its educational purposes. *Parham v. Hughes,* 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979):

> "A court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a state as expressed in the laws passed by their popularly elected legislatures. . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 441 U.S. at 351, 99 S.Ct. at 1746, 60 L.Ed.2d at 275.

In *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) it was said by the majority:

> "Because the equal protection clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same, this court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. . . . A legislature may provide for the special problems of women." 101 S.Ct. at 1204 (Citations omitted).

Respondent has referred to a number of commentators who deny that single-sex education confers benefits on women as claimed in the empirical studies cited by Petitioners. Basically it is argued that women either do not need or should not be protected by the "sheltered nature" of women's colleges. These authors are clearly entitled to their views and doubtless many women prefer and are better served by co-educational opportunities. They certainly exist for them in Mississippi as elsewhere. The standard for review here is not which theory is sounder but whether the view taken by the Women's College Coalition and others is so utterly devoid of reason as to render the State's acceptance of it (along with acceptance of the contrary theory) totally unreasonable.

There are many sociologists and legal theorists who reject the notion of any favored treatment for groups such as disadvantaged social groups and women. That argument was made here in *Fullilove v. Klutnick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) but was rejected by the majority. Special consideration for victims of past repression has certainly found favor with the Court and the Congress.

II. RESPONDENT WOULD BE UNAIDED BY ESTABLISHMENT OF AN ALL-MALE UNIVERSITY.

Respondent argues in his point IV that, as found by the Fifth Circuit panel, M.U.W. is unconstitutionally discriminatory because Mississippi does not maintain an all-male institution. Maintenance of an all-male university or college in another city would do nothing to help Mr. Hogan's convenience in attending a nearby school of nursing. Mississippi can logically conclude that men are afforded a full range of leadership and development potential in co-educational institutions and do not have the

special needs for separate educational opportunities afforded women. Hogan does not assert that M.U.W.'s nursing program is superior to that of the University of Mississippi or the University of Southern Mississippi, only that he would have to drive to Jackson or Hattiesburg (Record of Hearing pp. 25-26).

> "In being denied the right to attend the state college in their hometown (plaintiffs), are treated no differently than are other students who reside in communities many miles distant from any state supported college or university" *Williams v. McNair*, 316 F.Supp. 134 at 136, *aff'd*, 401 U.S. 951, 91 S.Ct. 976, 28 L.Ed.2d 235 (1971).

III. THE COURT OF APPEALS' DECISION IN THIS CASE INFERENTIALLY INVALIDATES 20 U.S.C. § 1681 (a) (5) (TITLE IX, EDUCATIONAL AMENDMENTS OF 1972).

Respondent argues that Title IX of the Educational Amendments is only an exercise of spending power by Congress and cannot restrict the reach of equal protection. Certainly the Congress cannot change the Constitution. However, the statute and its legislative history are clear that Congress intended to legislate that traditional single-sex institutions of undergraduate higher education be permitted to continue their single-sex policies. The School of Nursing is an undergraduate program leading to a Bachelor's degree, not a graduate, professional program. The sweeping away of the exemptive protections of this statute will affect not only M.U.W. but Texas Women's University and other traditional single-sex undergraduate institutions (even those that are considered private, but which receive Federal funds). The opinion below, if affirmed here, will seriously cloud, if not completely obliterate, the right of single-sex institutions to receive funds under that statutory exemption. Those charged with the duty to dispense funds

under Title IX must have concern with the rules affecting these disbursements post - Hogan. If this respondent can strike down a single-sex admission requirement absent the presentation of any evidence attacking its relevance to further a legitimate state interest in the face of undisputed testimony that it does that, no single-sex institution can pass muster.

IV. THE AMICI BRIEF OF NATIONAL WOMEN'S LAW CENTER, ET AL. DEFENDS A RULING DIFFERENT FROM THAT UNDER SCRUTINY.

The Amici Brief of February 1, 1982 mounts an attack on denial of admission to either sex by a professional School of Nursing. This is not the nature of the proceedings in the lower courts in this case. The Court of Appeals struck down the maintenance of a women's college by Mississippi without the simultaneous operation of an all-male college and that is the issue before this court. Special requirements as to nursing schools have never been raised before and by the authorities cited in Respondent's brief (page 10) cannot be raised for the first time in the Supreme Court.

Women's Legal Defense Fund, et al., attempt to separate the M.U.W. Nursing School from the University and treat it as a new institution founded in 1971. We must reemphasize that the lower courts did not consider such a limited issue, but dealt with the complaint as an attack on the University's single-sex status which it clearly was.

The argument that Mississippi's M.U.W. policy perpetuates sexual sterotypes by treating nursing as a women's profession does not square with the facts. Mississippi admits men and women to nursing schools operated at coeducational institutions and excludes men only at M.U.W. where the institution is dedicated to the education of women (a traditional role known to and recognized by Congress in Title IX).

Reliance on 42 U.S.C. § 292(d) and 298(b-2) is misplaced. Those statutes deal with grants by the Secretary of Health, Education and Welfare to support construction or subsidy of certain nursing and other programs. The statutory language states that the Secretary may not make such a grant unless the application contains satisfactory assurances of non-discrimination as to sex. There is no evidence that M.U.W. has ever applied for or received such a H.E.W. grant so the statutes have no application to this case.

CONCLUSION

The arguments presented in the Brief of the Respondent and the Amici Brief of National Women's Law Center, et al. are misplaced. The continued existence of Mississippi University for Women as a single-sex institution does indeed serve a substantially important governmental interest; therefore there is no breach of the Equal Protection Clause here.

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Amicus Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

MISSISSIPPI UNIVERSITY FOR WOMEN, et al.,

Petitioners,

v.

JOE HOGAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LEGAL DEFENSE FUND

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February 1, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

No. 81-406

MISSISSIPPI UNIVERSITY FOR WOMEN, et al.,

Petitioners,

v.

JOE HOGAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LEGAL DEFENSE FUND

At issue in this case is whether a state's gender-based refusal to allow Respondent to attend the Mississippi University for Women School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. It is another in the line of cases in which this Court has had an opportunity to develop and apply standards for implementing the

Fourteenth Amendment's guarantee of equal protection. Amici have a strong interest in the development and application of consistent and rigorous standards to protect women and men from government-imposed sex discrimination.

Amici bring to this case an expertise in Fourteenth Amendment law and extensive knowledge of the many forms that gender bias takes in our society. Amici respectfully submit that this brief will serve to illuminate the issue before the court by narrowing the focus presented by the parties and placing the issues in the context in which they have arisen: the admissions policy of a professional school of nursing.

The National Women's Law Center provides legal representation to protect and advance women's rights before federal administrative agencies and courts. The Center has placed a particular emphasis on

addressing problems of sex discrimination in education, is conducting training sessions for lawyers on legal issues applicable to sex discrimination in schools, and has handled precedent-setting litigation on those issues.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization with over 156,000 men and women in 726 chapters throughout the United States. A major goal of the NOW LDEF is securing equal rights and opportunities for females and males in education. In pursuit of this goal, NOW LDEF has participated in litigation challenging sex

bias in educational institutions and, through its Project on Equal Education Rights, works with parents and local educators to monitor enforcement of federal laws. In addition, NOW LDEF has a longstanding commitment to securing full and equal rights for women and men under the Constitution. NOW LDEF has participated as amicus curiae in numerous cases in this Court that have presented issues of gender-biased state action.

The Women's Equity Action League ("WEAL") is a national non-profit organization which seeks to enforce legal, educational and economic rights for women. WEAL represents a nationwide membership which has long worked for sex equity in undergraduate, graduate and professional school admissions.

The Women's Legal Defense Fund, ("WLDF"), founded in 1971 as a pro bono

organization of feminist attorneys, assists women in their efforts to achieve equality under the law. To further this goal the WLDF has performed both legal and educational services. One of the Fund's priorities has been to secure enforcement of legal provisions barring discrimination in education. To implement this goal the Fund has participated in various amicus briefs for the major Supreme Court cases affecting the rights of women in education and has actively participated in the oversight of Title IX enforcement through its membership in the Education and Women's Task Forces of the Leadership Conference on Civil Rights and the National Coalition of Women and Girls in Education.

Respectfully submitted,

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BRIEF AMICI CURIAE OF NATIONAL WOMEN'S LAW CENTER, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LEGAL DEFENSE FUND

INTEREST OF AMICI

The interest of amici appears in the foregoing motion.

STATEMENT OF THE CASE

The Mississippi University for Women ("MUW") maintains the only public nursing school in the nation that excludes men. This case involves Joe Hogan's challenge

to that exclusion under the Equal Protection Clause of the Fourteenth Amendment.

MUW contains an undergraduate college of arts and sciences and several other separately administered schools, including a graduate school, and a school of nursing.[1/] The School of Nursing was established in 1971. The undergraduate College of Arts and Sciences was established in the 1800's. The School of Nursing has its own admissions criteria which are different from, and more stringent than, the criteria for admission to the undergraduate college. Bulletin 31-35. For example, a higher American College Test score is required. Tr. at 31.[2/] The baccalaure-

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1/ These schools are listed separately in the 1980-1981 Bulletin of Mississippi University for Women (hereinafter, "Bulletin") 3; Transcript of Preliminary Injunction Hearing 3, 4 (hereinafter "Tr."). Stipulated Exhibit 4; Tr. 8, 10).

2/ Curriculum and other operational matters are handled separately by the various schools in the university. Tr. at 44; Strobel Deposition (hereinafter, "dep.") at 24.

ate nursing school curriculum consists largely of specialized training courses and requires extensive practical training in local hospitals and other medical service facilities. Id. at 227-28.[3/] The nursing school also offers graduate training leading to a master's degree (MS). Id. at 214, 228.

The parties have stipulated that although Mr. Hogan is academically and otherwise qualified to attend the nursing school at MUW, he has been denied permission to enroll solely because he is a male. Tr. 11.

Mr. Hogan is licensed as a registered nurse and has been employed as a nurse for seven years. He is married and lives in Columbus, where MUW is located. He testi-

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3/ The Vice President for Academic Affairs testified that nursing school faculty members have a different background from those in the undergraduate school -- "They by and large have not come up in the university; they come from hospitals and other medical service agencies." Craft dep. at 13.

fied that he works as a supervisor of the night shift at the Golden Triangle Regional Medical Center. Tr. 19.

Obtaining a bachelor's degree in nursing, which will require Mr. Hogan to complete two additional years of study, will enable him to advance in his profession. A bachelor's degree will entitle him to greater pay at his present job; afford him promotional opportunities; allow him to undertake more advanced education; qualify him to be a nurse anesthesiologist; and provide him with enhanced professional status and prestige. Tr. 18.[4/] In addition, because of the

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4/ There is a progression of degrees awarded by MUW in the field of nursing. These range from a licensed practical nurse (LPN) to a two year degree (associate nurse or AN degree) to a four year degree (BS) to a graduate degree nurse (MS).

The State of Mississippi licenses nurses to practice in the state as licensed practical nurses or registered nurses, and requires completion of courses at accredited nursing schools as a condition precedent to licensure. Miss. Code Ann. § 73-15-3 et seq. (1980).

growing professional pressure for registered nurses to have a four year BS degree, Mr. Hogan is concerned that he will be handicapped in the future if he does not have one. Tr. 18.[5/]

Mr. Hogan's nursing colleagues in Columbus, Mississippi who are women, are permitted to attend MUW's School of Nursing as part-time students while continuing to work. The Dean of the Nursing School testified that there are "many" students enrolled in the School of Nursing who are not full-time students and who are typically occupied in non-university jobs. Barrarr dep. at 29-30. Thus, Mr. Hogan's female colleagues who are similarly situated, and who compete with him for higher pay, more responsibility, and advanced

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5/ The American Nurses' Association has called for the establishment of a bachelor's degree as a minimum requirement for entry into the nursing profession. American Nurses' Association Commission on Nursing Education, A Case for Baccalaureate Preparation in Nursing (1979).

status and prestige, are given a competitive advantage by being permitted to obtain advanced nursing degrees while continuing to work.

Mr. Hogan filed a complaint alleging that his exclusion from MUW violated his rights under the Equal Protection Clause of the Fourteenth Amendment. After an evidentiary hearing, the district court entered summary judgment for MUW et al. on the ground that MUW's admissions policy was not arbitrary but bore a rational relationship to the state's goal of providing a range of educational opportunities for its female students. Petitioner's Brief for Certiorari at A-3. Subsequently, the court of appeals reversed, holding that it was improper for the district court to apply the rational basis test, since gender-based classifications require a showing that they are "substantially related to an important govern-

mental objective." Hogan v. Mississippi University for Women, 646 F.2d 1116, 1118 (5th Cir. 1981). The court of appeals further found that MUW's policy of "providing a unique educational opportunity for females but not for males . . . does not bear a substantial relationship to the important governmental objective of educating all its citizens." Id. at 1119.

MUW and the other defendants below filed a petition for rehearing and argued that Congress had approved public single-sex undergraduate institutions in enacting Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(5). The court of appeals rejected this argument on the ground that the enactment did not purport to allow states "to maintain practices otherwise violative of that [14th] amendment." 653 F.2d 222, 223 (5th Cir. 1981).

In their brief in the Supreme Court, Petitioners have asserted an argument never

presented below -- that MUW's single-sex policy is justified because it "is nothing more than educational affirmative action for females." Brief for Petitioner (hereinafter "Pet. Br.") at 7.

SUMMARY OF ARGUMENT

I.

This case presents a narrow question: Can a state, consistent with the Fourteenth Amendment, operate a traditional professional nursing school for female students and exclude, solely on the basis of gender, similarly situated men?

The single-sex admissions policy of MUW is a gender-based classification that has placed burdens on Respondent that are not placed on similarly situated women. This classification must be evaluated under the heightened scrutiny standard, Craig v. Boren, 429 U.S. 190 (1976), which is applicable even if the classification

is made without intent to discriminate, or if it explicitly disadvantages men.

In order for the admissions policy for MUW's School of Nursing to be constitutionally justified, the state must demonstrate that it bears a substantial relationship to an important governmental goal. Petitioners have asserted in this Court, for the first time in this litigation, that the governmental objective at issue is "educational affirmative action for females." The mere assertion of a compensatory rationale does not, however, meet the state's burden on this issue. The claim of compensatory rationale must be examined particularly closely when the gender-based classification reinforces a social stereotype of nursing as a "woman's profession." The record does not support the state's assertion that the reason behind MUW's admissions policy is a compensatory one, either with respect to the

School of Nursing or the university as a whole.

Nor have Petitioners demonstrated that the challenged policy is substantially related to the state's assertedly compensatory goal. The record does not support a conclusion that the School of Nursing's exclusion of men furthers affirmative action for women. The only basis Petitioners have advanced for the state's policy is several studies of the effects of single-sex education in undergraduate liberal arts colleges. No showing has been made of their connection to education for nursing. Indeed, there is no evidence to show that the School of Nursing's admissions policy furthers any compensatory purpose. Nor have Petitioners supported the claim that the single-sex policy of the university as a whole is justified as substantially related to the compensatory goal, since MUW has continu-

ously advanced a traditional and stereotypic view of women's roles.

II.

The state claims that the constitutionality of the School of Nursing's gender-based admissions policy is validated by the exemption from Title IX of the admissions policies of public undergraduate institutions that are historically single-sex. This provision was not intended to apply to nursing schools, since Congress has clearly declared its policy to oppose single-sex nursing education. Moreover, Congress cannot exercise its powers under Section 5 of the Fourteenth Amendment to validate an otherwise unconstitutional state policy.

ARGUMENT

I. THE STATE'S GENDER-BASED REFUSAL TO ALLOW A MALE NURSE TO ENROLL IN A PUBLIC NURSING SCHOOL IS UNCONSTITUTIONAL

Although arguments by the parties to this proceeding suggest that broad ques-

tions of single-sex education must be addressed by the Court, the facts of this case require the Court to decide a fairly narrow and discrete question: Can a state, consistent with the Fourteenth Amendment, operate a traditional professional nursing school for female students and exclude similarly situated men solely on the basis of gender?

This case does not present the broad question of whether all single-sex schools of education are unconstitutional. The case does not involve private schools. The case does not involve schools at the elementary or secondary level. The case does not even involve all state-operated schools of higher education. The case does not involve a school system that provides both co-educational and single-sex school opportunities to both men and women. This case also does not involve

any general claim of right to attend college in one's own community.[6/]

A. The State's Single-Sex Admissions Policy Is Sex-Based Discrimination Requiring Close Judicial Scrutiny

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6/ Amici respectfully suggest that the Court may wish to consider dismissing the writ as improvidently granted for three reasons:

(1) MUW is the sole public female-only school of nursing in the United States. Thus, any decision regarding the constitutional validity or invalidity of this school would have no significant impact anywhere else. See, e.g., McClanaham v. Morauer & Hartzell, 404 U.S. 16 (1971); Williams v. Zuckert, 371 U.S. 531 (1963); United States v. Shannon, 342 U.S. 288, 294-95 (1952) (Frankfurter, J.).

(2) Because the school in question is a professional school, not a liberal arts college (or a secondary or elementary school), and because the record is exceedingly sparse on the broader issue of single-sex schools generally, this case is not an appropriate one for resolving any aspect of that broader issue. See, e.g., Kimborough v. United States, 364 U.S. 661 (1966); Massachusetts v. Painten, 389 U.S. 560, 561 (1967).

(3) The chief argument presented by Petitioner -- that MUW serves as "educational affirmative action for women" -- was never presented to the district court or the court of appeals. Thus, the Court does not have the benefit of the lower courts' consideration of the issue, nor any record on which the issue can adequately be addressed. See Smith v. Butler, 366 U.S. 161 (1961).

The exclusion of males from the MUW School of Nursing is a facially gender-based classification. It is also apparent that the classification places a burden on Joe Hogan that is not placed on similarly situated females. Respondent's female nursing colleagues in Columbus, Mississippi, are permitted to attend the State's school of nursing at MUW as part-time students while continuing to work. They are afforded an opportunity to advance in their careers that he is denied.[7/]

The state maintains that these burdens are not significant, because

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7/ This case thus presents a clear instance of sex-based discrimination. Cf. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), aff'd mem., 430 U.S. 703 (1977). In Vorchheimer, the Third Circuit considered a challenge to a single-sex public school in the context of two adjacent, assertedly educationally equal public high schools, one for girls and one for boys. It concluded that "the benefits or detriments inherent in the system fall on both sexes in equal measure," and thus no issue of sex discrimination was presented. 532 F.2d at 886. The single-sex admissions policy at issue here is readily distinguishable.

Respondent has the option of attending a coeducational public nursing school in Hattiesburg or Jackson. Petitioners' Brief for Certiorari at 8. However, commuting to those schools would involve one-way distances of 147 or 178 miles, respectively. Respondent testified to the hardship that such travel would entail. Tr. 19. As a practical matter, he would be unable to fulfill the course requirements, undertake the practical training connected with the nursing schools in those other cities, have study time equivalent to that afforded co-workers attending MUW, and at the same time continue to perform well in his job at Golden Triangle Regional Medical Center.

It is true that Mr. Hogan could relinquish his job, sell his home, and move to Hattiesburg or Jackson. This possible course of action serves to highlight the burden on him, rather than eliminate

it.[8/] As the Court has previously noted, the "absence of an insurmountable barrier will not redeem an otherwise unconstitutionally discriminatory law". Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). A constitutionally invalid law cannot be made valid by the fact that the burden imposed by the law can in some cases be overcome. Id. at 455; Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980).

The existence of this gender-based barrier requires, as the Fifth Circuit held and Petitioners now concede, Pet. Br. at 10, the heightened scrutiny that the Court has consistently applied in challenges to gender-based classifications. See, e.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980);

8/ The question whether disparate treatment based on sex might still exist if Mississippi were to create an "all-male institution comparable to MUW," 646 F.2d at 1119, is not presented by this case and should not be decided in the abstract by the Court.

Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).[9/]

The fact that the state does not intend to disadvantage one sex, or even that it purports to act for the laudable purpose of assisting one sex, will not protect the classification from close scrutiny. Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977). Nor does the fact that a classification expressly discriminates against men rather than women protect it from rigorous constitutional review. See, e.g., Craig v. Boren, 429 U.S. at 197; Orr v. Orr, 440 U.S. at 278.

Because of the severe and pervasive nature of sex discrimination, this Court has stated that the burden is on the state

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9/ The Fifth Circuit was also correct in its view that this Court's summary affirmance in Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971), has no bearing on this case, since it pre-dated the Court's articulation of the heightened scrutiny standard of review in sex discrimination cases.

to show "an exceedingly persuasive justification" for any gender classification. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981), citing Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

This Court has further clearly established that a heightened scrutiny standard of review places the burden on the government to show that the classification bears a close and substantial relationship to an important government objective. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980); Craig v. Boren, 429 U.S. 190 (1976).

B. The State's Gender-Based Classification Lacks the Requisite Substantial Relationship To An Important Governmental Objective.

1. Petitioners' Belated Assertion of "Educational Affirmative Action for Females" as the Government's Objective Cannot Serve as an "Automatic Shield" for MUW's Single-Sex Admissions Policy.

Petitioners have belatedly asserted that the single-sex admissions policy of MUW's School of Nursing serves to compensate women for past discrimination due to sex.10/ Pet. Br. at 7-8. Their claim is that the admissions policy is "nothing more than educational affirmative action for females." Pet. Br. at 7. This argument was neither asserted nor argued below and was not raised in the Petition for Certiorari.11/

10/ Petitioners' claim before this Court that the single-sex admissions policy of MUW's School of Nursing is compatible with the equal protection command relies only on their newly asserted "affirmative action" purpose Pet. Br. at 11. Amici, therefore, focus their argument that the state has not met the heightened scrutiny standard on this asserted government objective.

11/ In the Court of Appeals, Petitioners claimed a different governmental objective, "providing educational opportunities to women," as the goal served by the admissions policy of MUW's School of Nursing. 646 F.2d at 1118. The Fifth Circuit correctly analyzed this asserted goal as begging the question of whether such a gender-based goal was itself proper. Id. In rejecting the state's argument in support of its policy, the Court of Appeals concluded that the state's a priori decision to provide differential educational opportunities could not meet constitutional standards for justifying gender-based classifications.

This Court has made clear that government must do more than merely announce a compensatory purpose to sustain a gender classification As the Court stated in Weinberger v. Wiesenfeld:

> [T]he mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme, 420 U.S. 636, 648.

A close scrutiny of Petitioners' asserted compensatory objective reveals that it is unsupported by the record in this case. The State has not offered any evidence that the School of Nursing was added to MUW in 1971 with a compensatory objective in mind.[12/] There is no indica-

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12/ Although some overlap exists between the MUW School of Nursing and the undergraduate School of Arts and Sciences (they share the same university president, for example, as well as cafeteria, library and some other facilities), the record supports a conclusion that the School of Nursing is a separately administered school in the university and should be regarded as a separate entity for purposes of the equal protection challenge here. See Statement of the Case, pp. 2-3 supra.

tion that the state identified or considered problems of discrimination against women in nursing, discussed any various methods of remedying such problems, or implemented its admissions policy with any of those issues in mind.

Indeed, rather than serving to compensate women for past discrimination, the gender classification challenged here "carries with it the baggage of sexual stereotypes," Orr v. Orr, 440 U.S. at 283, by reinforcing a long-held societal view that nursing is a "woman's" profession. The Dean of MUW's School of Nursing reflected this view when she stated: "I think nursing is uniquely female most of the time." Barrarr dep. at 25.

As this Court has recognized, all gender-based classifications "carry the inherent risk of reinforcing the stereotypes . . .", Orr v. Orr, 440 U.S. at 283, about women and their "proper" roles.

Even when a gender line has the purported aim of helping women, if the classification in fact only helps some women but hurts others by perpetuating "role typing," it violates the Constitution's equal protection guarantees. Orr v. Orr, 440 U.S. at 282. As Justice Brennan stated in University of California Regents v. Bakke, 438 U.S. 265 (1978) (concurring opinion):

> "(W)e nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority." Id. at 360.

In fact, the stereotyping of nursing as "woman's work" operates to harm both men and women. Men have been excluded or discouraged from entering the field. See An Expanded Profession of Nursing for Men and Women, 1972 National Journal of

78.[13/] The resulting job segregation is often described as responsible for the low status and low wages of women in nursing,[14/] as well as in other "women's jobs." As one commentator has observed:

> "Integrating jobs will . . . help change the wage structure because as men enter traditionally female jobs, the pay level of these jobs should rise. The classic example is the rise in pay and status of secondary school teachers and

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13/ Approximately 97 per cent of registered nurses and 93 per cent of non-registered nurses are women. Equal Employment Opportunity Commission, Hearings on Job Segregation and Wage Discrimination Under Title VII and the Equal Pay Act, (Feb. 20. 1980) (Statement of the American Nurses Association). The percentage of men graduating from schools of nursing rose from 2.6 per cent in 1970 to 4.5 per cent in 1973. How Do Men and Women Students Rate in Empathy, 1977 American Journal of Nursing, 998. By 1978, only 6.32 percent of all students admitted to nursing programs were men. Nursing Data Book, 1981 National League of Nursing.

14/ The 1977 National Sample Survey of Registered Nurses conducted by the American Nurses' Association for the U.S. Public Health Service revealed an average yearly earning for full-time registered nurses of $12,938. Moses and Roth, Nurse Power: What do Statistics Reveal About the Nation's Nurses, 1979 The American Journal of Nursing, 9-10.

> social workers as men entered these fields. Ross, The Rights of Women, 36-37 (1973).

See also Equal Employment Opportunity Commission, Hearings on Job Segregation and Wage Discrimination Under Title VII and the Equal Pay Act 18 (Feb. 20, 1980) (Statement of the American Nurses Association). A public policy of breaking down the sex segregated nature of the nursing profession is seen in the federal government's decision to prohibit the use of federal funds to support nursing schools and other health care facilities that discriminate in admissions on the basis of sex. These laws apply to nursing schools that are affiliated with undergraduate colleges or universities. 42 U.S.C. §§ 292(d), 298(b-2); 34 C.F.R. § 103.2(f)(3).

Petitioners' claim that the objective of MUW's single-sex admissions policy is to compensate women does not become any

more persuasive when considered as applying to the university as a whole. Since MUW was established in 1884, the legislature of Mississippi and the Mississippi Board of Trustees of Institutions of Higher Learning have reviewed and reaffirmed MUW's purposes on several occasions. Tr. at 6, 11. The charter, in effect today, provides:

> "The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss. Code Ann. Sec. 37-117-3 (1972).

It is apparent on its face that the view of education for women reflected in this

charter reinforces "the role-typing society has long imposed". Stanton v. Stanton, 421 U.S. 7, 15 (1975). This view is perpetuated at MUW by the way in which the charter is actually implemented today. See pp. 31-33 infra.

There simply is no indication that the objective of "affirmative action for females" had anything to do with the establishment of MUW or plays any part in the maintenance of its single-sex admissions policy today. The state's failure to articulate any basis for its eleventh hour claim of compensatory purpose renders that claim transparent, particularly since no attempt was made to assert it below, where an appropriate inquiry could have been made.

2. The Challenged Gender Line is Not Substantially Related to the Asserted Compensatory Purpose.

Assuming arguendo that the state's objective in establishing and maintaining

the challenged gender-based classification was to provide "affirmative action for females", Petitioners have totally failed to show that the single-sex admissions policy of MUW's School of Nursing is substantially related to that goal. In essence, Petitioners argue that an all-female nursing school is, in and of itself, substantially related to the compensatory purpose, without demonstrating any further connection between the policy and the purpose. Although there may be circumstances in which all-female environments are an important element in achieving a compensatory goal, there has been no showing that MUW's baccalaureate nursing program presents such a circumstance.

Petitioners' sole support for Mississippi's decision to adopt a single-sex nursing school as the means to redress sex discrimination is the fact that several studies and statements support the

general proposition that single-sex liberal arts colleges for women can compensate women for past discrimination due to sex. Pet. Br. at 12-19. These studies deal only with undergraduate colleges, and therefore are wholly unpersuasive on the issue of single-sex education in a professional school such as nursing. Petitioners have made no attempt to demonstrate any link between the findings in these studies and the function, design, and practice of baccalaureate nursing programs. Whatever value the cited research may have in other connections, it does not illuminate the question the Court must decide.[15/]

15/ The State suggests that these studies merit this Court's attention because one of them was "cited with approval by the lower courts" in Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), aff'd mem. 430 U.S. 703 (1977). Pet. Br. at 13. It is clear, however, that the justification for sex-segregated education found by the Third Circuit in Vorchheimer is inapplicable here. The Vorchheimer court's decision was about single-sex education at

[footnote continued]

Moreover, the actual evidence introduced in this case contradicts Petitioners' claim that female nursing students at MUW are better served by the single-sex policy. The Dean of MUW's School of Nursing conceded that the presence of men in nursing school courses on the MUW campus would have no adverse effect on the education or achievement of female nursing students. She stated further that the presence of men in nursing school courses would have no significant effect on curriculum or methodology employed in the school.

[footnote continued]

the high school level, where it considered "the special emotional problems of the adolescent years", 532 F.2d at 887, as particularly prominent. The Third Circuit viewed these problems as support for the existence of single-sex public high schools. Id. It is neither necessary nor appropriate to address this concern at all in the instance case. Higher education, in particular education for a profession, is the relevant subject. Moreover, the Third Circuit came to its conclusion on the basis of a trial record that included both expert testimony and stipulations of the parties. No such record exists in this case to support the maintenance of a single-sex admissions policy.

Barrarr dep. at 6-7; see also Herber dep. at 4, 6.

These concessions reflect the simple fact that men may audit courses, including those given at the nursing school, without receiving credit. Exhibit 5, Defendants' Answer to Interrogatory 11.[16/] Similarly, men may attend continuing education courses at MUW, including those in the Nursing School. Tr. 26, 39, 55-56. Men may use the campus cafeteria and other facilities used by nursing school students. Indeed, a significant portion of the nursing school curriculum consists of practical training in local medical facilities in which both men and women work. Strobel dep. at 59-60.

In short, there is a total absence of evidence supporting the validity of a single-sex nursing school as a means of

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16/ In fact, Mr. Hogan was told that he could audit any courses that he chose but that he could not receive course credit.

addressing discrimination against women. To the contrary, the evidence in this case demonstrates that the single-sex policy at issue has no such benefits.

It is clear as well that even when the nursing school is treated as an inseparable part of the MUW liberal arts program, the single-sex policy as implemented by MUW is not in fact substantially related to a goal of "affirmative action for females."

The studies upon which Petitioners rely find educational benefits to women resulting from single-sex schools that are quite different from MUW. For example, the cited studies note the role-model value for young women that results from having female administrators and faculty in women's colleges. But at MUW, each of its ten presidents has been male. Similarly, the present executive vice president is male, the vice president for

academic affairs is male, the directors of the admissions, personnel and other important departments are male, and the deans of the undergraduate college, the graduate school, and the education school are male. The senior faculty is also dominated by men. Bulletin at 7-8, 245-52.

In contrast to the studies' identification of the importance of preparating women for nontraditional roles, of the fifteen degrees MUW offers, eleven are in fields historically reserved for women, such as social work, education, music, medical technology and nursing. Bulletin at 7-8. Some of the course offerings themselves are more consistent with old notions about the roles of women. For example, the "Contemporary Woman" course of study is described in the MUW Bulletin as a series of courses "designed to prepare young women for the very active roles

demanded of them in the Twentieth Century." Four courses are offered: Fashion, Introduction to Modeling, [Advanced] Modeling, and Personal Development (which "presents various methods of self-improvement in appearance and . . . acceptable procedures in social situations".) Bulletin at 109.

In sum, there is no basis in the record of this case to support a finding that the gender-based classification at issue substantially furthers a Mississippi goal of redressing discrimination against women, either in the nursing school alone, or as a part of the university as a whole. Rather, the single-sex admissions policy in the nursing school carries baggage of sexual stereotypes that this Court has found incompatible with the Equal Protection principle.

II. THE STATE'S CLAIM THAT A FEDERAL EDUCATION STATUTE IS DISPOSITIVE OF THE EQUAL PROTECTION CLAIM IS MISPLACED.

A. The Title IX Exception Does Not Evidence Congressional Intention to Permit the Gender Exclusion At Issue in this Case.

Petitioners' assert, Pet. Br. 12, that the state is entitled to discriminate on the basis of sex in admissions because it is covered by an exception to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. which evidences congressional intent "to permit gender-based discrimination in admission standards by certain women's colleges, including MUW". Pet. Br. 12. Title IX's general prohibition of sex discrimination, 20 U.S.C. § 1681(a), states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, pro-

> fessional education, and graduate higher education, and to public institutions of undergraduate higher education.

20 U.S.C. § 1681(a)(5) contains the exemption:

> In regard to admission this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

MUW's School of Nursing comes within the definitions of professional education and graduate education as defined in the regulations implementing Title IX. See 34 C.F.R. §§ 106-2k, n (1980). It offers study beyond the Bachelor of Science degree, a Master of Science in Nursing, and its program "leads to a first professional degree in a field for which there is a national specialized accrediting agency," the National League of Nursing. Bulletin at 213, 221.

Moreover, in 1971, one year before passage of Title IX, Congress passed the Nurse Training Act of 1971, 42 U.S.C. § 296 et seq., which explicitly prohibits sex discrimination in admissions by any school of nursing that receives federal funds or enters into contracts with the federal government. 42 U.S.C. § 298b-2. The Act and the regulations issued thereunder expressly provide that the legislation applies to nursing schools affiliated with undergraduate colleges and universities. 34 C.F.R. § 103.2(f)(3) (1980).

A review of the legislative history of Title IX reveals that, in adopting the exception for public single-sex schools, Congress was focusing on undergraduate, liberal arts institutions and did not intend to perpetuate sex discrimination in access to professional training or graduate programs leading to career advancement.

The 1971 debates in both the House and the Senate contain statements about the need to ensure equal access to professional and graduate training, and focus on the shortage of adequate medical care as a result of sex discrimination. See, e.g., 117 Cong. Rec. 30403 and 30409-10 (1971) (remarks of Sen. Bayh, sponsor of Title IX), 117 Cong. Rec. 39248 (1971) (remarks of Rep. Erlenborn), id at 39253 (remarks of Rep. Sullivan), id at 39259 (remarks of Rep. McClory). Even the Congressmen who opposed Title IX as applied to private, liberal arts colleges agreed that there should be equal access to education which leads directly to jobs or provides training for the professions. See, e.g., 117 Cong. Rec. 37782-84 (1971) remarks of Rep. Quie), id at 39256 (remarks of Rep. Steiger) and id. at 39260 (remarks of Rep. Erlenborn).

When Title IX was re-introduced by Senator Bayh in 1972, it prohibited sex

discrimination in admissions to "vocational education, professional education and graduate higher education and to public institutions of undergraduate higher education". 118 Cong. Rec. 5803 (1972). Senator Bayh pointed out that his bill was narrower than the House version and that vocational, professional and graduate institutions, "where the most insupportable discrimination lies," would be covered. 118 Cong. Rec. 5804 (1972) (emphasis added).

At the same time, the Senate recognized that single-sex institutions, particularly private undergraduate colleges, required further study and hearings in order to determine the feasibility of requiring that all schools adopt sex-neutral admissions policies. Id. at 3937 and 5807-08. Only after such studies and hearings had been completed would Congress be in a position to answer

the questions raised by private, undergraduate single-sex schools. Id. Nevertheless, Senator Bentsen introduced, and the Senate hastily adopted, the language which became 20 U.S.C. § 1681(a)(5), exempting from Title IX public undergraduate schools that had traditionally and continually admitted only students of one sex. 118 Cong. Rec. 5814-5815 (1972). Thus, Congress recognized that it did not have sufficient information to make finely tuned judgments about the distinctions between single-sex and coeducational sex-neutral admissions to public undergraduate schools but adopted the Bentsen amendment as an interim measure pending further study on the admissions issue.

By contrast, however, Congress never doubted the need to eliminate sex discrimination in admissions to institutions for vocational, professional and graduate education: "No one can argue that these schools

have any justifiable reason to discriminate against one sex or the other." 118 Cong. Rec. 3937 (1972) (remarks of Sen. Bayh).

Moreover, the single-sex exemption by its own terms applies only to an institution that "traditionally" admitted one sex at the time that Title IX was enacted. 20 U.S.C. § 1681(a)(5) and 34 C.F.R. § 106.15(e). The MUW School of Nursing clearly has no such tradition. It was only established in 1971, one year prior to the passage of Title IX, and did not receive accreditation until 1980. Tr. at 58. The Bachelor of Science in Nursing program, to which Mr. Hogan seeks admission, was not established until 1974. Barrar dep. at 10. Consequently, the single-sex exception to Title IX can hardly be interpreted to exempt an institution that was only one year old or a program of study that did not even exist at the time the statute was passed.

Consequently, contrary to Petitioners' claim, the single-sex exemption in Title IX does not evidence congressional approval of exclusion of males from MUW's School of Nursing.[17/]

B. The Single-Sex Exemption to Title IX Does Not Validate Unconstitutional State Action.

Even if the MUW Nursing School were covered by the single-sex exemption to Title IX, Congress could not properly immunize the school from Respondent's claims that MUW's admissions policies are unconstitutional. As the Fifth Circuit correctly ruled, in MUW's petition for rehearing en banc: "Congress may indeed

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17/ There is some ambiguity in the language of Title IX because it did not deal specifically with the overlap between the term "professional" and the term "undergraduate." The Secretary of the Department of Health, Education and Welfare, who was given responsibility for implementing Title IX, issued regulations applying Title IX to "administratively separate units" within an educational institution "composed of more than one school, college or department." 34 C.F.R. § 106.2(o) (1980).

enforce the Fourteenth Amendment by virtue of section five thereof, but this enactment does not purport to and could not allow states to maintain practices otherwise violative of this amendment". 646 F.2d at 223. This ruling summarizes the scope of Congress' power under section five of the Fourteenth Amendment to enact measures that prevent state involvement in unlawful discrimination. See Katzenbach v. Morgan, 384 U.S. 641 (1966); Rhode Island Associated General Contractors v. Kreps, 450 F. Supp. 338 (D.R.I. 1978). Such statutes can prohibit discriminatory state actions and adopt remedies for improper state actions that violate the Fourteenth Amendment, but they cannot properly restrict the scope of equal opportunity guaranteed by the Fourteenth Amendment. See Ridgefield Women's Political Caucus v. Fossi, 458 F. Supp. 117, 122 (D. Conn. 1978); Leffel v.

Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1120 (E.D. Wis. 1978).

Thus, Congress' enactment of Title IX and the single-sex exemption did not pre-empt the issue of sex discrimination in admissions to educational institutions. Rather, the courts must determine whether the particular state action challenged here violates equal protection and is therefore unconstitutional.

CONCLUSION

The narrow issue before this Court is whether a state school of nursing may, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude on the basis of gender a male applicant who is similarly situated to admitted female applicants. For the reasons stated above, we submit that it may not, and for those reasons the

decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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